

“A Centenary of a Mistake?”: An Outsider’s Critical Analysis of, and Reply to, the Approach of Professor Hasnas

D A R C Y L . M A C P H E R S O N *

I. INTRODUCTION

American business-law scholar John Hasnas believes that the idea of corporate criminal liability is inconsistent with the basis of the criminal law generally.¹ He advocates for the abolition of corporate criminal liability.² He is hardly alone. Many scholars, mainly American, have taken issue with the idea of corporate criminal liability.³ However, others have taken the

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¹ John Hasnas, “The Centenary of a Mistake: One Hundred Years of Corporate Criminal Liability” (2009), 46 *Am Crim L Rev* 1329.

² See James G Stewart, “Symposium on Corporate Personhood and Criminal Liability: A Pragmatic Critique of Corporate Criminal Theory: Lessons From The Extremity” (2013), 16 *New Criminal L Rev* 261 at 285, n 87.

³ See e.g. Elizabeth K Ainslie, “Indicting Corporations Revisited: Lessons of the Arthur Andersen Prosecution” (2006), 43 *Am Crim L Rev* 107 (although this article frames the Arthur Andersen prosecution as problematic, the arguments made there could easily be applied more generally); V S Kanna, “Corporate Criminal Liability: What Purpose Does It Serve?” (1996), 109 *Harv L Rev* 1477 (arguing on a law-and-economics basis that the purposes served by the criminal law for corporations can be at least as well served by other means); Albert W Alschuler, “Two Ways To Think About the Punishment of Corporations” (2009), 46 *Am Crim L Rev* 1359 (arguing that

opposite position.⁴ Still others believe that while the institution of corporate criminal liability is sound, there is a significant over-criminalization of the corporation, and therefore, revamping the institution is required.⁵ Still others believe that while there were certainly some “wrong turns” in the development of corporate criminal liability,⁶ and that improvements are possible, the institution serves a valuable function. Other scholars have focused their attention on questions of generalized enforcement (through the general law of criminal offences, typically by the federal Department of Justice in Washington), as opposed to more specialized, regulatory, agency-based enforcement.⁷ Finally, some authors have taken issue with arguments made both for and against corporate criminal liability⁸ from a pragmatic perspective.⁹

Why mention all of these different approaches at the beginning of the paper? Simply put, many of the authors of the pieces that come after Professor Hasnas’s piece in time cite the paper on which I will comment herein. This means that whatever one’s view on corporate criminal liability, Professor Hasnas seems to be an important, and often-cited, figure among abolitionists and others commenting on this area of law.

corporate criminal liability is akin to two ancient causes of action and that, because of their antiquated notions of justice, corporate criminal liability must also be wrong); Miriam H Baer, “Organizational Liability and the Tension between Corporate and Criminal Law” (2010), 19 JL & Pol 1 (although Baer claims not to be undermining corporate criminal law, but to be deeply rethinking it, she does conclude with the following remark: “On the other hand, it might allow prosecutors to go back to doing what they do best: prosecuting individuals”).

⁴ See e.g. Ian B Lee, “Corporate Criminal Responsibility as Team Member Responsibility” (2011), 31:4 Oxford J Legal Studies 755; James W Harlow, “Note: Corporate Criminal Liability for Homicide: A Statutory Framework” (2011), 61 Duke LJ 123, at particularly 136; David A Maas, “Policing the Ratings Agencies: The Case for Stronger Criminal Disincentives in the Credit Rating Market” (2011), 101 J Crim L & Criminology 1005 (dealing with the possibility of new offences being created in response to the conduct of credit rating agencies).

⁵ Carlos Gomez-Jara Diez, “Corporate Culpability as a Limit to the Overcriminalization of Corporate Criminal Liability: The Interplay between Self-Regulation, Corporate Compliance, and Corporate Citizenship” (2011), 14 New Crim L Rev 78.

⁶ See Samuel W Buell, “The Blaming Function of Entity Criminal Liability” (2006), 81 Ind LJ 473.

⁷ Max Minzner, “Should Agencies Enforce?” (2015), 99 Minn L Rev 2113.

⁸ Due to space limitations, as well as other constraints, there are many interesting questions that cannot be raised in this paper. For example, considerations of corporate officer liability are beyond the scope of this paper. On this point, however, see e.g. Amy J Sepinwall, “Responsible Shares and Shared Responsibility: In Defense of Responsible Corporate Officer Liability”, [2014] Colum Bus L Rev 371; Peter J Henning, “Making Sure “The Buck Stops Here”: Barring Executives for Corporate Violations”, [2012] U Chicago Legal F 91 (arguing for officer disqualification in the face of repeated violations).

⁹ Stewart, *supra* note 2.

Second, the point of view of the abolitionists is, for me at least, the most dangerous approach. While I freely admit that corporate criminal liability (in virtually any jurisdiction) is far from perfect, abolition takes away the main element where attribution of moral wrongdoing is officially the point. If the maintenance of a moral compass in business is important (as I believe it is), corporate criminal liability (whatever its acknowledged flaws) is one way to do this, and an important one.

Third, unlike some of the other abolitionists, who often rely on one or two quite nuanced arguments to advance the argument in favour of abolition, as will become evident below, Professor Hasnas lays out many arguments to support his core belief in favour of abolition of organizational criminal liability. Since I am genuinely opposed to the idea of abolition, I want to try to answer as many arguments in favour of abolition as possible. Given that Professor Hasnas puts forward many arguments in favour of abolition, a comment on this article seems to present an opportunity for the most “bang” for the proverbial “buck.”

Finally, I cannot, at least in a single article, answer all of these viewpoints. The debate about the appropriateness of corporate criminal liability is more than black and white (retention or abolition). There are many shades in between, that is, issues and approaches to consider. So, I begin by acknowledging their existence and arguments. Then, I focus on one of the leaders of the abolitionist school of thought and tackle the obstacles that he puts forward in an article that others in the debate have clearly read and believe advances the abolitionist position.

Because I am focused on the abolitionist position advanced by Professor Hasnas, I am leaving aside the final portion of the paper presented by him. This final portion deals with a brief consideration of alternate standards of organizational criminal liability,¹⁰ in addition to the explicitly vicarious liability for organizational criminal liability currently in place at the federal level in the United States.¹¹

¹⁰ Professor Hasnas refers to both the Model Penal Code and the Weissman standard. See the American Law Institute, Model Penal Code, Proposed Official Draft (Philadelphia, Pennsylvania: American Law Institute, 1962). See also Andrew Weissmann, “A New Approach to Corporate Criminal Liability” (2007), 44 Am Crim L Rev 1319.

¹¹ To be clear, I do not do this in an attempt to minimize the importance of these alternate standards. In fact, the opposite is true. First, the abolitionist view is important enough to warrant its own treatment. The same is true of the proper characterization of the alternate standards examined by Professor Hasnas. The best way to ensure separate treatment is to deal with these issues in separate articles. Therefore, the proper characterization of alternate standards will have to wait for another day.

II. A ROADMAP

Beginning this paper with my conclusion, I fundamentally disagree with Professor Hasnas both in terms of his supposition (i.e. that corporations cannot be considered moral agents for the purposes of the criminal law) and the conclusion he draws from it (i.e. it is inappropriate to have any form of corporate criminal liability at all). In the pages that follow, I will attempt to unpack the arguments made by Professor Hasnas in defence of his position, even though he himself appears to realize that this is inconsistent with current trends in the criminal law.¹²

In Part III, I explain my “outsider” status, as a lawyer and academic steeped not in the American legal tradition, but rather with legal education and experience divided between both Canada and the United Kingdom. I explain why, though some might see this as a drawback, it can be a strength in writing a paper like this one.¹³ In Part IV, I return to what I believe may be the unwritten chasm that separates my position from that of Professor Hasnas, namely, the theoretical “burden of proof.” Finally, in Part V, I lay out each of Professor Hasnas’s arguments against organizational criminal liability, along with a response to each.

¹² Hasnas, *supra* note 1 at 1329.

¹³ This status may provide some interesting parallels that might actually assist in the secondary project of Professor Hasnas, that is, to improve the mechanism by which the acts of an individual are attributed to the corporation or other organization. However, as mentioned above, this paper is focused on countering the primary project of Professor Hasnas, that is, his argument that organizational criminal liability is *per se* misguided.

III. AN OUTSIDER?

The title makes clear that I consider myself to be an “outsider.”¹⁴ I say this in large part because I am Canadian, and I am challenging the assertions of an American.¹⁵ The Canadian approach to criminal law generally, as well as to organizational criminal liability specifically, is somewhat different than that offered at the federal level by our neighbours to the south.

The first major distinction is that our criminal law proper is entirely federal in nature. “Criminal Law and Procedure” is a specific head of jurisdictional competence reserved to the federal government.¹⁶ This is not to say that there is not a significant welfare state in Canada; quite clearly, there is. Many administrative and regulatory programs have offences attached to them, at all levels of government – federal, the ten provinces¹⁷ (known as “states” in the

¹⁴ Some readers may be particularly perplexed by this assertion, given that I am publishing this piece in an academic publication in my home jurisdiction. But there is a hope that that this will be read by others outside of Canada. To give fair hearing to the concerns of Professor Hasnas, it is, in my view, necessary to lay out for the reader the differences between the criminal law with which I am familiar (Canada) and the criminal law that sparked the debate in the publications that I am discussing (the U.S.). Some Canadian readers may be more conversant with issues of business and trade law, and not be as familiar with American criminal law. Some American readers may not be familiar with Canadian criminal law either. Readers from outside North America may not be terribly familiar with either one. In an effort to make the arguments here as accessible to as wide an audience as possible, I felt that the risk of redundancy was worth taking. Also, careful readers will point out that I have not substantively addressed the changes made by *An Act to Amend the Criminal Code (criminal liability of organizations)*, SC 2003, c 21 [Bill C-45]. This is true. However, Bill C-45 contains new substantive, statutory rules as to how organizations are to be held liable for criminal offences under the *Code*. I am very much interested in all of these new rules and have written extensively with respect to them. See, for example, Darcy L MacPherson, “Extending Corporate Criminal Liability?: Some Thoughts on Bill C-45” (2004), 30 Man LJ 253-284; Darcy L MacPherson, “Criminal Liability of Partnerships: Constitutional and Practical Impediments” (2010), 33 Man LJ 329-390; Darcy L MacPherson, “The Civil and Criminal Applications of the Identification Doctrine: Arguments For Harmonization” (2007), 45 Alta L Rev 171-202.

The point here is not to assess the Canadian position vis-à-vis its American counterpart. In such a discussion, Bill C-45 would be highly relevant. The point here is to assess a philosophical position: Is criminal liability for non-human organizational actors viable *at all*? In our discussion therefore, Bill C-45 is, at most, of tangential relevance.

¹⁵ I have completed law degrees in Canada and United Kingdom, and taught law in Canada for more than 15 years.

¹⁶ *Constitution Act, 1867 (UK)*, 30 & 31 Vict, c 3, s-s 91(27).

¹⁷ Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland and Labrador, Nova Scotia, Ontario, Prince Edward Island, Québec, and Saskatchewan.

U.S.) and three territories¹⁸ and municipalities.¹⁹ Increasingly, Aboriginal forms of government are also being recognized as being best-suited to deliver social programs to their own populations.²⁰

Offences contained within the provincial and municipal regulatory schemes are typically not referred to as “criminal law” proper in Canada.²¹ For example, the vast majority of the regulation of securities markets lies within the purview of the provinces and territories from a constitutional jurisdictional standpoint.²² Therefore, from the Canadian perspective, much of the

¹⁸ Jurisdictionally, the three territories (the Northwest Territories, Nunavut, and the Yukon Territory) function in a way akin to the provinces and pass legislation similar to that of the provinces. Constitutionally, there are some differences between provinces and territories. However, these differences are not relevant to the arguments made here.

¹⁹ Admittedly, from a constitutional perspective, a municipality does not generally have any powers, other than those delegated to it by the province. On this point, see the judgment of Justice Kerwin (as he then was) in *Saumur v City of Quebec*, [1953] 2 SCR 299 at 320–321, [1953] 4 DLR 641. Municipalities are generally created and recognized by provincial legislation, and cannot impinge upon areas of federal jurisdictional competence, or even impinge upon areas provincial jurisdiction other than those specifically transferred to, or shared with, the municipality.

²⁰ See Tim Edgar, Arthur Cockfield, & Martha O’Brien, eds, *Materials on Canadian Income Tax*, 15th ed (Toronto: Carswell, 2015) at 196–197 (for a brief discussion on the ability of Aboriginal groups to tax their membership).

²¹ *R v Sault Ste Marie (City)*, [1978] 2 SCR 1299, *per* Justice Dickson (as he then was), for the Court, [1978] SCJ No 59 [*Sault Ste Marie*]. Essentially, the Court drew a distinction between “true” criminal offences on the one hand and “public welfare offences” on the other. Very briefly, the Court decided that where offences were attached to a regulatory scheme legitimately within provincial legislative competence, the offences designed to ensure compliance with that scheme would not be outside of the legislative competence of the province. This would be true even if there was a penalty associated with non-compliance *and* that the penalty was designed to ensure a “public purpose,” such as public order, health, or public morals.

²² *Reference re Securities Act*, 2011 SCC 66, [2011] 3 SCR 837, *per* the Court. But first, a word about procedural issues: a judgment “by the Court” means that no particular Justice is identified in the judgment as being its author. This modern practice is used for any number of reasons, including politically sensitivity, in a perhaps unsuccessful attempt to avoid undue criticism of the author of the judgment. This anonymizing practice was used in *Dyck v Manitoba Snowmobile Association*, [1985] 1 SCR 589, [1985] SCJ No 34; *Irwin Toy v Quebec (Attorney-General)*, [1989] 1 SCR 927, [1989] SCJ No 36; *Reference re Supreme Court Act, ss. 5 and 6*, 2014 SCC 21, [2014] 1 SCR 433. Interestingly, in the latter two cases, the practice was employed even though there was a dissent in each case. This is different from jointly-authored reasons. Usually, the latter are authored by two members of the Court. See *R v Sparrow*, [1990] 1 SCR 1075, [1990] SCJ No 49, *per* Chief Justice Dickson *and* Justice LaForest, for the Court; *Backman v Canada*, 2001 SCC 10, [2001] 1 SCR 367, *per* Justices Bastarache and Iacobucci, for the Court; *Spire Freezers Ltd v Canada*, 2001 SCC 11, [2001] 1 SCR 391, *per* Justices Bastarache and Iacobucci, for the Court. Peter McCormick and Marc Zanoni present an interesting historical analysis of the development

regulatory state uses only quasi-criminal offences for enforcement purposes at the provincial level. The *Criminal Code of Canada*²³ is our primary expression of criminal law,²⁴ although it is not alone.²⁵ Again, this is not to say that other federal and provincial enactments do not have offence provisions contained

and change of this institutional practice of “by the Court” judgments over time. See Peter McCormick & Marc Zononi, “The First “By the Court” Decisions: The Emergence of a Practice of the Supreme Court of Canada” (2015), 38 *Man LJ* 159.

A second procedural point is the use of the term “reference.” Pursuant to the *Supreme Court Act*, RSC 1985, c S-26, the federal government may refer questions to the Supreme Court of Canada for legal opinion, even without a cause of action or ongoing litigation. For example, in *Reference re Securities Act*, the federal government had proposed to pass wide-ranging legislation to regulate the securities industry. This type of legislation had been typically recognized, up until this point, as under the provincial legislative purview. Therefore, the federal government sought the opinion of the Supreme Court of Canada with respect to the constitutionality of the proposed legislation before enacting it into law. While the Supreme Court of Canada agreed that certain parts of the proposed legislation would be constitutional, large parts of the proposed legislation were held as unable to pass constitutional muster. The legislative project was later abandoned. Thus, some of the matters that would be considered “federal criminal law” in the U.S. would be considered neither “criminal law” nor “federal” in Canada.

In *Reference re Supreme Court Act*, ss. 5 and 6, the issue was whether the appointment of a particular judge to the Supreme Court of Canada was appropriate. The majority of the Court opined that given the wording of the *Supreme Court Act*, *supra*, and the quasi-constitutional nature of the statute, as well as certain provisions of the *Constitution Act, 1982*, the appointment was not valid.

²³ RSC 1985, c C-46 [*Criminal Code*].

²⁴ Interestingly, for most offences under the *Criminal Code*, *ibid*, the provincial Attorneys-General are tasked with prosecution decisions. See the *Criminal Code*, s 2, *sub verbo* “Attorney General”. Also, it is generally provincially-organized courts (with judges appointed by the province) that administer most trials with respect to *Criminal Code* offences. So this is a federal statute largely administered and run by provincially-appointed politicians (seeing as the provincial Attorneys-General are appointments made by the premier – the equivalent to a U.S. state governor).

There are a limited number of offences with respect to which the federal Attorney-General is the relevant authority. See the *Criminal Code*, s 2, *sub verbo* “Attorney General”. The Prime Minister – the equivalent to the U.S. President – selects the federal Attorney-General. Interestingly, unlike Canada’s neighbors to the south, there is a far closer connection between the legislative and executive branches of government in Canada. Generally, the Prime Minister and all the members of his or her Cabinet are elected as members of the House of Commons and also sit in the House, each as an elected member of the ruling party.

²⁵ Another example of the exercise of federal criminal law jurisdiction is the *Controlled Drugs and Substances Act*, SC 1996, c 19.

within them – even serious ones. However, these are generally not considered, at least from a constitutional perspective, to be criminal law in its truest sense.²⁶

In some ways, this “outsider” status is a double-edged sword. On the one hand, critics of the following article may simply say that I do not understand the American legal system, that I am not sufficiently familiar with its traditions, or that I have never lived its realities. However, on the positive side, this same status means that I am “fresh” to the problem in a way that an American-trained lawyer would likely not be. In this way, there is clearly an advantage in being an outsider. I also bring certain knowledge of another legal system (namely, Canadian common-law rules and the statutory criminal law that amended them) which might be more difficult – though admittedly, not impossible – for a “native” lawyer to accumulate from the United States.

Late in his paper, Professor Hasnas discusses alternate standards for corporate criminal liability, other than the vicarious liability standard currently in place at the federal level in the United States. Some of what Professor Hasnas has to say about the alternate standards would actually bring the American organizational criminal liability scheme far closer to its Canadian counterpart. But that comes later. For now, it is important to recognize that the definition of “criminal law” in the American sense (including, as it does antitrust violations, as well as violations of the rules of the federal Securities and Exchange Commission)²⁷ may affect how some people view the appropriateness of the entire notion of organizational criminal liability.

We begin in the next section by assessing what appear to be, at least to me, certain critical assumptions that seem to motivate the fundamental argument that Professor Hasnas is making in favour of abolition. Disagreements about these fundamental assumptions may help explain how Professor Hasnas and I arrive at such divergent viewpoints on the appropriateness of the institution of organizational criminal liability. Then, in Part V, I break down and respond to

²⁶ For example, the Canadian federal *Competition Act*, RSC 1985, c C-34, would fall under the broad rubric of “antitrust legislation” by our American counterparts. But in Canadian jurisprudence, this piece of legislation is, for constitutional purposes, classified under the “Trade and Commerce” power given to the federal government pursuant to s-s 91(2) of the *Constitution Act, 1867*, *supra* note 16, and not the criminal law power, pursuant to s-s 91(27). See *General Motors of Canada Limited v City National Leasing*, [1989] 1 SCR 641, [1989] SCJ No 28, *per* Chief Justice Dickson, for the Court. Technically, the Court was dealing with the legislation anteceding the *Competition Act*, then known as the *Combines Investigation Act*, RSC 1970, c C-23.

²⁷ As most American readers will already be aware, these are found in Chapter 17 of the *Code of Federal Regulations* (US).

the individual arguments that Professor Hasnas makes in his case for abandoning organizational criminal liability completely.²⁸

IV. THE DIFFERENCE IN THE UNDERLYING ASSUMPTIONS?

It is necessary to tackle the underlying policy assumptions of the arguments above at the beginning, rather than at the end, of a paper like this. However, in my view, given the circumstances, these assumptions should be laid bare. There are at least two interrelated reasons for this.

First, I believe that the underlying assumptions show where each author starts their analysis. Everyone has and needs a starting point for their analysis. By demonstrating what those starting-points are, the differences between myself and Professor Hasnas will hopefully become both more apparent and more logical for the reader, and thus make the substantive arguments presented below more readable.²⁹

Second, underlying assumptions are rarely made explicit. While I believe I am on reasonably safe ground as to the underlying assumptions that animate the arguments of Professor Hasnas, he would be entirely within his rights to correct any misapprehension on my part. Having begun this paper with these underlying assumptions, Professor Hasnas or anyone else who disagrees with respect to those underlying assumptions could, if they wished, dismiss the entire paper on that basis. But my hope is that my responses to the substantive arguments of Professor Hasnas will carry the day, not simply these assumptions. Therefore, I hope that these arguments will remain intact, even if this short section on the underlying assumptions does not find favour with the reader.

Given this approach, what are Professor Hasnas's basic underlying assumptions? Professor Hasnas seems to believe that it is a requirement that someone show why a person should be subject to the criminal law. Put another way, the burden of proof is on those who think that organizational criminal liability ought to exist.

In general, I do not subscribe to this assumption. My starting assumption is that everyone is subject to the criminal law, unless and until it is shown why a person should not be subject to the criminal law.³⁰

²⁸ Hasnas, *supra* note 1 at 1329.

²⁹ That said, I think it would be only fair to acknowledge that though I disagree with him, Professor Hasnas has put together a well-written article. Out of respect for this, I believe that I need to confront head-on the arguments he has explicitly put forward in writing.

³⁰ For example, the criminal liability of a person over the age of 12 is presumed, pursuant to the *Criminal Code*, *supra* note 23, s-s 16(2), until the contrary (i.e. legal insanity) is proven by either party – pursuant to the *Criminal Code*, s-s 16(3).

There is also a second, related assumption that needs to be explored. I believe that Professor Hasnas and I agree that underlying the criminal law is a moral bedrock. If the criminal law is a basic moral compact between the state and its citizens, citizenship demands acceptance of the reasonable consequences of breaching that moral compact. Put another way, a citizen has a perfect right to disagree with the law as it stands, even the criminal law. One can see this both in the protests that preceded the decriminalization of the possession of marijuana – admittedly, this is of course true only in some states – on the one hand, and the ongoing protests in the United States with respect to abortion, on the other. In the first of these, there is what could be perceived as a slow-developing consensus with respect to decriminalization. On the other, there appears to have been a four-decade-long fight to maintain decriminalization through constitutional analysis. But in both cases, the lack of social consensus with respect to these issues has led to significant disagreement on whether the activity at issue should be criminalized at all.

Every citizen should have the right to engage in these debates. But, the citizen has no reason to say that this disagreement with the law means that the law cannot be applied to him, her or, in this case, it.

If this is true, morality is generally not optional. As a general rule, individuals do not get to choose which areas of the criminal law they accept. Therefore, I begin with the assumption that since corporations are legal persons, they should be "citizens". But this needs some unpacking.

By "citizenship," I am not referring to the technical process by which an individual becomes a citizen of the particular nation. Rather, I am using the term in its much larger sense, denoting a sense of reciprocity to a jurisdiction where one takes advantage of the services and social networks that the jurisdiction provides. In a sense, "citizenship", as the term is used here, is about a sense of belonging to a place to the point that many people (though this need not be universally true) would feel a need to treat that place with the respect of a home.

Perhaps a specific example may help here. It is quite common in the U.S. for a university graduate to feel a very strong connection to his or her *alma mater*. While it is true the departments of alumni affairs try very hard to remind their alumni of that connection, it is also true that for many graduates, the sense of connection is present without the constant reminder. As the term is used here, these graduates are very much "citizens" of their former stomping grounds. The sense of needing to show one's gratitude for the role that one's *alma mater* has played in shaping the life the alumnus now has (and the need to demonstrate that gratitude overtly) is an example of the reciprocity of which the term "citizenship," as the term is used here, demonstrates. In other words,

in the jurisdictions where a corporation deliberately solicits business (thereby implicitly seeking recognition of the personhood provided to the corporation outside its home jurisdiction), reciprocity demands that the corporation accept the application to it of the laws of that jurisdiction, including the criminal law.

Such an approach to citizenship is also consistent with the constitutional jurisprudence on the ability of the courts on both sides of the Canada–U.S. border to take jurisdiction over a corporation. In *International Shoe v State of Washington*,³¹ the Supreme Court of the United States held as follows:

Applying these standards, the activities carried on in behalf of appellant in the State of Washington were neither irregular nor casual. They were systematic and continuous throughout the years in question. They resulted in a large volume of interstate business, in the course of which appellant received the benefits and protection of the laws of the state, including the right to resort to the courts for the enforcement of its rights. The obligation which is here sued upon arose out of those very activities. It is evident that these operations establish sufficient contacts or ties with the state of the forum to make it reasonable and just, according to our traditional conception of fair play and substantial justice, to permit the state to enforce the obligations which appellant has incurred there. Hence, we cannot say that the maintenance of the present suit in the State of Washington involves an unreasonable or undue procedure.³²

Canada is similar both in the constitutional reach of its courts and its tax law. In order for the Canadian courts to recognize a judgment issued by another court, there must be, at a bare minimum, a “real and substantial connection” between the litigants or the facts underlying the judgment, on the one hand, and the court that originally issued the judgment under review, on the other.³³ This is in practice similar to the “sufficient contacts” standard from *International Shoe*.³⁴

In terms of income tax law, “carrying on business” in Canada is one basis of amenability to tax for non-residents.³⁵ Yet, some sort of minimal contact with

³¹ 326 US 310 (1945), *per* Chief Justice Stone, delivering the opinion of the Court [*International Shoe*].

³² *Ibid* at 320.

³³ The first case to use this language of “real and substantial connection” as a constitutional touchstone in the Supreme Court of Canada was *Morguard Investments Ltd v De Savoye*, [1990] 3 SCR 1077, [1990] SCJ No 135, *per* Justice LaForest for the Court. However, it has been used in a number of related contexts. See the judgment of Justice Major, for the majority, in *Beals v Saldanha*, 2003 SCC 72, [2003] 3 SCR 416; the judgment of Justice Gascon, writing for the Court, in *Chevron Corp v Yaiguaje*, 2015 SCC 42, [2015] 3 SCR 69, among others.

³⁴ *Supra* note 31.

³⁵ See the *Income Tax Act*, RSC 1985, c 1 (5th Supp), s-s 2(3).

Canada is required.³⁶ This requirement makes it clear that when a business organization seeks to take advantage of doing business in Canada to Canadian residents, it is generally amenable to Canadian income tax.

It then follows that unless there is some compelling reason why business activity in general should be exempt from the criminal law – the corporation is by far the most ubiquitous form of business organization in North America³⁷ – the corporation as an institution should be subject to the criminal law.

I acknowledge that the “fit” between the criminal law and organizational criminal behaviour is not perfect. But, the law can adapt, and achieve its baseline goal, that is, to not leave all corporate activity outside of the law’s basic moral compact between the state and its citizens. Professor Hasnas believes the point of the criminal law is to protect the citizenry from what can be the awesome power of the state. To be fair, this is part of the responsibility of the criminal law, and in particular, the procedural protections that the criminal law offers to the defendants who appear before the courts as alleged offenders.

However, with all due respect, the criminal law does not end there. It is equally designed to promote an acknowledgement of moral wrongdoing and culpability when necessary. When two come into conflict – the importance of the corporation as an institution to our capitalist economic system,³⁸ on the one hand, and the importance of the moral base of the criminal law applying to all citizens, on the other – the latter, in my view, must prevail.

Put another way, in my view, these baseline assumptions keep me from agreeing with Professor Hasnas.

³⁶ See *Sudden Valley Inc v Minister of National Revenue*, [1976] 2 FC 462, 68 DLR (3d) 376, [1976] CTC 297, 76 DTC 6178 (FCTD), per Justice Addy, aff’d (1976), [1977] 1 FC 617, 72 DLR (3d) 158, [1976] CTC 775, 76 DTC 6448 (Fed CA).

³⁷ *Canadian Dredge & Dock Co Limited v The Queen*, [1985] 1 SCR 662, [1985] SCJ No 28 [*Canadian Dredge & Dock*], per Justice Estey, for the Court; Joel Bakan, *The Corporation: Pathological Pursuit of Profit and Power* (Toronto: Viking Canada, 2004).

³⁸ For a neo-Marxist view of the new Canadian statutory rules, which attempt to show that these rules are in fact designed to maintain the status quo, see Harry Glasbeek, “Missing the targets – Bill C-45: reforming the status quo to maintain the status quo” (2013) 11:2 *Policy & Practice in Health & Safety* 9. See also Steven Bittle, *Still Dying for a Living: Corporate Criminal Liability after the Westray Mine Disaster* (Vancouver: UBC Press, 2012). Lest I be misunderstood, I am not endorsing these views. In fact, I disagree with them quite vehemently. However, to not acknowledge that my acceptance of the current Canadian economic system does not affect my views of the new Canadian statutory rules would be intellectually dishonest. The best way for me to provide a counterpoint to my own views is to point the reader to the writings of authors who do not accept the current basis of the Canadian economic system.

V. ARGUMENTS

A. NO MORAL AGENCY

Hasnas begins his rebuke by pointing out that corporations are considered by many theorists to not be moral agents.³⁹ Other theorists have postulated that the criminal law, or, more appropriately, the idea of state-sanctioned punishment more generally (which is at the core of the criminal law) rests on the idea that the recipient of the punishment (that is, the offender) is a rational moral agent⁴⁰ capable of understanding the moral suasion that the criminal law is attempting to exert through its punishment function.⁴¹ However, there are several responses to this.

1. “No Moral Code” Is Not the Same As “Insanity”

First, at least under Canadian law, being without a moral code is not a justification or excuse for criminal activity. In order not to be found not criminally responsible due to mental disease or defect, only two types of diseases or defects will qualify. Diseases where the actor is unable to appreciate the nature or quality of his or her act (that is, for example, the actor is unable to recognize, due to mental disease or defect, that the swing of a hammer to the back of the victim’s head will result in serious injury or death) will qualify.⁴² If the actor is unable to appreciate that the act undertaken by the actor is wrong, this will also qualify.⁴³

Legal “insanity” (or a lack of criminal responsibility for acts that would otherwise attract liability under the criminal law) is actually quite narrow. First of all, there is no suggestion of any “disease” or “defect” in the corporation. Therefore, the corporation as an institution cannot avail itself of the defence of legal “insanity” because one of the basic criteria for its application is self-evidently absent.

Second, in the 2004 book, entitled *The Corporation: Pathological Pursuit of Profit and Power*,⁴⁴ Canadian legal academic Joel Bakan argues quite forcefully

³⁹ Hasnas, *supra* note 1 at 1330–1333.

⁴⁰ *R v Bouchard-Lebrun*, 2011 SCC 58 at para 50, [2011] 3 SCR 575, per Justice LeBel for the Court [*Bouchard-Lebrun*], citing the decision of Chief Justice Lamer, for the majority, in *R v Chaulk*, [1990] 3 SCR 1303 at 1321, [1990] SCJ No 139 [*Chaulk*].

⁴¹ See Andrew von Hirsch & Andrew Ashworth, *Proportionate Sentencing: Exploring the Principles* (Oxford: Oxford University Press, 2005) at 12.

⁴² *Bouchard-Lebrun*, *supra* note 40; *Chaulk*, *supra* note 40.

⁴³ *Bouchard-Lebrun*, *ibid.*

⁴⁴ Bakan, *supra* note 37.

that the corporation is, as an institution, a psychopath.⁴⁵ Interestingly, Professor Bakan does not make the argument that the corporation is not a responsible moral agent. One can accept the argument that a corporation is meant to be self-interested,⁴⁶ but this does not mean that the corporation necessarily cannot understand that what it is doing will be perceived as being wrong by society as a whole. Rather, Professor Bakan’s argument is that, as an institution, it is simply incapable of caring whether society as a whole would perceive its acts as wrong.⁴⁷ This is quite different from not being aware that society as a whole would perceive the allegedly criminal activity as wrong. The inability to perceive the wrongfulness of the act would be considered “insanity” in the legal sense; the inability to care about it would not. Living or existing by a moral code separate and apart from the one that society considers appropriate is no excuse at law for a failure to obey the law.

Put another way, disagreement with the criminal law as formulated is not an excuse for a failure to follow it. The corporation, as an institution, at least in Professor Bakan’s account, simply sets itself apart from the criminal law by focusing uniquely on the ends for which the corporation was formed (most often, with business corporations at least, these are economic ends).⁴⁸

When the corporation is viewed in these terms, it is not that the corporation is not criminally responsible, within the meaning of s 16 of the *Criminal Code*.⁴⁹ Just as the law assumes that all adults are capable of rational decision-making, and are therefore amenable, as a general proposition, to the criminal law, the law also assumes that a corporation can understand the moral

⁴⁵ While I find this argument interesting, this does not necessarily mean that I subscribe to it. For a more detailed account of my views, see Darcy L MacPherson, “Companies Gone Wild – A Review of The Corporation: The Pathological Pursuit of Profit and Power” (2005) 31 *Man LJ* 201–208.

⁴⁶ Bakan, *supra* note 37 at 34–35.

⁴⁷ *Ibid* at 50, puts it this way: “... at least in the United States and other industrialized countries, the corporation, as created by law, most closely resembles Milton Friedman’s ideal model of the institution: it compels executives to prioritize the interests of their companies and shareholders above all others and forbids them from being socially responsible – at least to genuinely so.”

⁴⁸ Of course, there are corporations that serve other ends. But, the corporation is predominantly used as a form of business organization in today’s society. However, in Canada at least, government sometimes creates corporations to serve *public* ends. See e.g. the *Canada Post Corporation Act*, RSC 1985, c C-10, ss 4–5. But these are relatively few in number, especially when compared to the number of corporations and other entities that serve explicitly economic ends.

⁴⁹ *Supra* note 23.

qualities of the act undertaken by it, even if it, as an institution, chooses or feels compelled to ignore the moral implications of that same act.⁵⁰

Professor Bakan's choice to use Milton Friedman as the quintessential proponent of the narrow role for the social responsibility of the public corporation is quite interesting. He is quite correct that Friedman says that the primary purpose the corporation is to make money. But even Friedman does not go so far as to suggest that a breach of the law is permissible in the name of profit-seeking.⁵¹ A relevant excerpt from one of Friedman's canonical books reads as follows:

In such an economy, there is one and only one social responsibility of business - to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition, *without deception or fraud*. Similarly, the "social responsibility" of labor leaders is to serve the interests of the members of their unions. It is the responsibility of the rest of us to establish a framework of law such that an individual in pursuing his own interest is, to quote Adam Smith again, "led by an invisible hand to promote an end which was no part of his intention..."⁵²

If the underlined passages are to mean anything, they must mean (at the very least) that a corporation is not entitled to breach the clearly-stated criminal law with impunity. If any part of the law is a "rule of the game", it is, in my view at least, the criminal law. I take the final sentence of the excerpt to mean that society, if it wishes to draw the actor away from the primary mission – that is, making money – it must do so by clearly-stated laws that require the actor to do or not do something specific. Friedman is discussing the role of corporate directors in promoting what I would assume he would view as "nebulous" assertions of "corporate social responsibility". This would mean that specific prohibitions, including criminal ones, would apply. It is interesting that Friedman refers specifically to "fraud" separately from "deception". Fraud is clearly a legal concept;⁵³ deception is not necessarily so. It is equally interesting that Friedman is avowedly talking about the responsibilities of the business, that is, the corporation.

⁵⁰ Bakan, *supra* note 37, ch 2.

⁵¹ See Milton Friedman, *Capitalism and Freedom*, 40th Anniversary ed (Chicago: University of Chicago Press, 2009) at 133.

⁵² *Ibid* [emphasis added].

⁵³ *Criminal Code*, *supra* note 23, s 380.

2. *The Law Decides the Content of the Separate Legal Personality of the Corporation*

The second response is that the law itself has decided to give separate legal personality to corporations. As such, the law itself is entitled to determine the content of that personality. Put another way, there can be little doubt that corporations (or at least modern ones)⁵⁴ are acknowledged to have a legal personality separate from those involved in their operations (that is, directors⁵⁵ and officers,⁵⁶ as well as other employees⁵⁷), as well as those persons who provide capital for its activities (that is, both shareholders and creditors⁵⁸).

The nature of this separate legal personality is unclear.⁵⁹ According to Canadian legal academic Christopher C Nicholls,⁶⁰ there is certainly a school of thought that suggests that this separate legal personality, though recognized statutorily,⁶¹ is a reflection of a reality that genuinely occurs.⁶² The idea is that there is in fact a collective will of the corporation that is separate from the

⁵⁴ Prior to the mid-19th century, formation of a corporation did not necessarily entitle the resulting entity to a legal personality separate from those involved in its operations, or its finances. On this point, see J Anthony VanDuzer, *The Essentials of Canadian Law: The Law of Partnerships and Corporations*, 3rd ed, (Toronto: Irwin Law, 2009) at 90-91.

⁵⁵ *Lee v Lee's Air Farming Ltd*, [1961] AC 12 (PC), per Lord Morris of Borth-y-Gest, for their Lordships [*Lee's Air Farming*].

⁵⁶ VanDuzer, *supra* note 54 at 129-130.

⁵⁷ *Lee's Air Farming*, *supra* note 55.

⁵⁸ On both counts, see e.g. *Salomon v Salomon & Co*, [1897] AC 22 (HL) [*Salomon*].

⁵⁹ Admittedly, in most real-world situations, problems do not require consideration of the source of separate legal personality of a corporation. Once one accepts that a corporation has a legal personality separate from those that provide capital and those responsible for running its operations, the source of this personality is usually irrelevant.

⁶⁰ Christopher C Nicholls, *Corporate Law* (Toronto: Emond Montgomery Publications Ltd, 2005).

⁶¹ See *Canada Business Corporations Act*, RSC 1985, c C-44, s-s 15(1) [CBCA]; *Business Corporations Act*, RSA 2000, c B-9, s-s 16(1) (Alberta); *The Business Corporations Act*, RSS 1978, c B-10, s-s 15(1) (Saskatchewan), *The Corporations Act*, CCSM c C-225, s-s 15(1) (Manitoba); *Business Corporations Act*, RSO 1990, c B.16, s 15 (Ontario); *Business Corporations Act*, SNB 1981, c B-9.1, s-s 13(1) (New Brunswick); *Corporations Act*, RSNL 1990, c C-36, s-s 27(1) (Newfoundland and Labrador); *Business Corporations Act*, SNWT 1996, c 19, s-s 15(1) (Northwest Territories); *Business Corporations Act*, SNWT (Nu) 1996, c 19, s-s 15(1) (Nunavut), as adopted by the *Nunavut Act*, SC 1993, c 28, s 29; and *Business Corporations Act*, RSY 2002, c 20, s-s 18(1) (Yukon).

⁶² Nicholls, *supra* note 60.

individual wills of the human beings involved in decision-making. There are many problems with this “realist” approach.⁶³

However, there are two other types of approaches: the fiction theory⁶⁴ and the concessionist theory.⁶⁵ The fiction theory holds that the “personality” is nothing more than a convenient fiction created by the law to achieve certain

⁶³ My thoughts on this issue are hardly original, though I cannot point to a single source for all of the ideas presented here. First, corporations do not come into existence this way. A corporation reaches full legal maturity the instant that it is incorporated. *Salomon*, *supra* note 58 at 51, *per* Lord MacNaghten. There is no need for any “*continuity of experience*” or even any observable shareholders. Secondly, the whole assertion of a “*collective will*” of the corporation is liable to criticism. If there are multiple decision-makers who pass a corporate resolution, this so-called exercise of the “*collective will*” is the result of mutually-influenced *individual* wills. This is not an organic process. Third, what if there's only one decision-maker (a sole shareholder and director)? Where is the collectivity of this will? Fourth, where is the organic personality if it is only, for example, a tax scheme, or other artifice, whether legally acceptable or not? Fifth, if the realist theory were true, then one could apply a separate legal personality to organizations which according to the law, do not have separate legal personality, such as partnerships. On this last point, see William S Laufer, *Corporate Bodies and Guilty Minds: The Failure of Corporate Criminal Liability* (Chicago: The University of Chicago Press, 2006) at 44–47 seems to suggest that although the American courts used the term “corporate criminal liability”, these liability rules nonetheless apply to many collectives in addition to corporations, including partnerships. Therefore, at least in the United States, the fifth point may not carry as much weight as it otherwise might.

⁶⁴ Interestingly, the use of this term in describing the source of the separate legal personality of a corporation is one of the areas where I believe that the two countries may diverge somewhat. For example, Laufer, *ibid*, suggests that the “fiction theory” can be traced back to the judgment of the Supreme Court of the United States in *Dartmouth College v Woodward*, 17 US 518 (1819) [*Dartmouth*]. While Nicholls cites the same case in *Corporate Law*, *supra* note 60 at 11, the case never uses the word at all. Regardless, my use of the term refers to the *source* of the personality ascribed to the corporation. If it develops naturally, then it is said to be “real.” If it is simply an outgrowth of choices made by legislation, it is more appropriately described as “fiction” or “concessionist.”

To be fair, there is some literature to suggest an approach that is exceptionally convenient for the abolitionist. As Professor Ian Lee explains: “For instance, the claim that corporate criminal liability unfairly punishes innocent shareholders appears to be premised on what corporate theorists refer to as the ‘aggregate theory’ of corporate personality, namely that the corporation is the alter ego of its shareholders. It is on that basis that punishment of the former is equated with punishment of the latter” [footnotes omitted]. See Lee, *supra* note 4 at 765. From a Canadian perspective at least, the aggregate theory as Professor Lee explains it is particularly problematic, given the holding by the Supreme Court of Canada in *Peoples Department Stores Inc (Trustee of) v Wise*, 2004 SCC 68 at para 42, [2004] 3 SCR 461, *per* Justices Major and Deschamps for the Court, that for the purposes of fiduciary duty, the “best interests of the corporation” are *not* to be equated with the best interests of the shareholders collectively.

⁶⁵ Nicholls, *ibid* at 21–24.

policy goals. The limited liability of shareholders of a corporation⁶⁶ (which flows naturally from the effect of the corporation being separate from those very shareholders) encourages investment by both limiting risk and increasing reward.⁶⁷

As Professor Nicholls explains the "concessionist theory," this is a variant on the fiction theory. Though the concessionist theory acknowledges the fiction of the separate legal personality of the corporation, it also acknowledges the necessity and centrality of the government in providing this fiction.⁶⁸ Put another way, a concessionist approach makes legislative and other legal choices a central feature of the separate legal personality corporations. As may already be evident, I put myself in this last camp. Thus, if governmental intervention is at least important (if not critical) to the assignment of separate legal personality to corporations, it follows that the content of that personality is what the government says it is. If that is so, the amenability of corporations to criminal liability is no less legitimate than any other policy choice made by government. In fact, both common law⁶⁹ and statute⁷⁰ would seem to suggest that is a policy choice implicitly made by the legislature, and explicitly recognized by judges. The fact that judges, as opposed to legislatures, made the specific ruling that the personality assigned to corporations included such amenability to the criminal law does not make this amenability any less legitimate.

3. No "Blowing Hot and Cold"

The third response to Professor Hasnas involves the narrowness of his subject-matter. Professor Hasnas is not challenging the right of shareholders to invoke separate legal personality in the corporation to protect their interests at a general level. Instead, he is suggesting that the separate legal personality of the corporation does not extend so far as to implicate any corporation in any crime. Presumably, therefore, the separate legal personality of the corporation, and the separate liability of the corporation that extends from this personality remains in place for non-criminal activity.

⁶⁶ Interestingly, in both Canada and the United States, it would appear that the term "limited liability" is actually a misnomer. As we will return to discuss in more detail below, as a general rule, the shareholders of a general business corporation do not have limited liability for the debts of the corporation. Subject to limited exceptions, they have no liability whatsoever.

⁶⁷ VanDuzer, *supra* note 56 at 116–125.

⁶⁸ Nicholls, *supra* note 60 at 20.

⁶⁹ Salomon, *supra* note 58.

⁷⁰ CBCA, *supra* note 61, s-s 15(1).

In a well-known case before the Supreme Court of Canada,⁷¹ the Court was confronted with the issue of “insurable interest.” The facts of the case were as follows: the plaintiff, an immigrant of Greek origin,⁷² had come to Canada with limited English skills,⁷³ and had begun a business. On the advice of his lawyer, the plaintiff moved the business assets into a corporation, but really did not understand the full impact of this choice.⁷⁴ When he applied for insurance, the plaintiff listed himself personally as the insured. When there was fire and smoke damage to the premises of the business, the defendant insurance company resisted payment under the insurance policy on the basis that the plaintiff was not the owner of the assets, and therefore did not have an “insurable interest” in the assets.

The plaintiff made two major arguments. The first was based on corporate law; the second focused on insurance law. With respect to the latter, the Court held that there were two lines of authority with respect to the meaning of “insurable interest.” The more relaxed definition⁷⁵ would have favoured the plaintiff’s position; the stricter definition⁷⁶ would have favoured the defendant’s position. The Supreme Court of Canada decided the more relaxed definition was to be preferred on the facts of the case.⁷⁷ However, this is not a paper about insurance. Therefore, we turn to the corporate law.

With respect to the corporate law issue, the argument was in essence that the court ought to ignore the separate legal personality of the corporation, and “pierce the corporate veil.”⁷⁸ The effect of this argument, if accepted, would have been to make the plaintiff the direct owner of the assets, thereby ensuring that under any definition of “insurable interest,” the plaintiff would have been successful.⁷⁹ Justice Wilson, writing for the majority of the Court, held as follows:

There is a persuasive argument that ‘those who have chosen the benefits of incorporation must bear the corresponding burdens, so that if the veil is to be lifted at all that should only be done in the interests of third parties who would otherwise suffer

⁷¹ *Kosmopoulos v Constitution Insurance Co*, [1987] 1 SCR 2, [1987] SCJ No 2 [*Kosmopoulos* (SCC)].

⁷² *Kosmopoulos v Constitution Insurance Co of Canada*, (1983) 149 DLR (3d) 77, 42 OR (2d) 428 (Ont CA), *per* Justice Zuber, for the Court [*Kosmopoulos* (CA)].

⁷³ *Ibid* at para 2.

⁷⁴ *Ibid*.

⁷⁵ See *Lucena v Craufurd et al* (1806), 2 Bos & Pul (NR) 269, 127 ER 630.

⁷⁶ See *Macaura v Northern Assurance Co Ltd*, [1925] AC 619 (HL).

⁷⁷ *Kosmopoulos* (SCC), *supra* note 71 at 30.

⁷⁸ *Ibid* at 10.

⁷⁹ *Ibid* at 10-11.

as a result of that choice’: Gower, *supra* at p. 138. Mr. Kosmopoulos was advised by a competent solicitor to incorporate his business in order to protect his personal assets and there is nothing in the evidence to indicate that his decision to secure the benefits of incorporation was not a genuine one. Having chosen to receive the benefits of incorporation, he should not be allowed to escape its burdens. He should not be permitted to ‘blow hot and cold’ at the same time.⁸⁰

Put another way, the formation of a corporation does not happen by accident.⁸¹ The principal of the business or other concern must actively decide to form a corporation and take specific steps to operationalize this decision. The lyrics of the theme song to the 1980s situation comedy, *The Facts of Life*, are apposite here: “You take the good, you take the bad, you take them both, and there you have – the facts of life.” Incorporation is a choice with both positive and negative consequences. The separate legal personality of the corporation provides protection against personal responsibility for its debts on the part of its shareholders. The principal of the business (prior to its incorporation) can effectively separate the assets used in the business, on the one hand, from personal assets of the principal, on the other. The principal of the business can receive dividends, which in many circumstances receive better treatment in terms of taxation than do other forms of income.⁸² The income-splitting benefits of the interposition of a corporation have been recognized by the Supreme Court of Canada.⁸³ These are just some of the benefits of carrying on business through a corporation.

When one chooses to carry on business in this way, one also accepts some of the negative implications that arise from this choice. One such negative implication is that the corporation that one has formed may be subject to criminal liability, in addition to the criminal liability to which individuals are

⁸⁰ *Ibid* at 11, citing L C B Gower, *Gower’s Principles of Modern Company Law*, 4th ed (London: Sweet & Maxwell, 1979) at 112.

⁸¹ This can be distinguished, for example, from the formation of a partnership. Under both Canadian and English law at least, it is clear that a partnership may be formed without the specific intent of the parties to form a partnership, at least subjectively. A court may still find that there was a partnership, despite the fact that every partner alleged that it was not their intention to form a partnership. On this point, see, in Canada, *Redfern Farm Services Ltd v Wright*, 2006 MBQB 4, 2006 CarswellMan 4 (Man Master); and in England, *Adam v Newbigging* (1888), 13 App Cas 308 (UKHL) at 315, *per* Lord Halsbury.

⁸² See *Income Tax Act*, *supra* note 35.

⁸³ See *McClurg v Minister of National Revenue*, [1990] 3 SCR 1020, [1990] SCJ No 134 *per* Chief Justice Dickson, for the majority.

subject.⁸⁴ The right of government to charge corporations with criminal wrongdoing has been established for decades, if not centuries. If one wants the benefits of incorporation, one cannot pick and choose the results that one wants, and those that one wants to avoid. Incorporation is not a buffet line; one cannot avoid the foods one does not enjoy. A full meal involves all the food groups. One of them is probably something with respect to which most of us might otherwise opt to pass up, but the government can make us take it all.

It is interesting to note that one of the first cases that asserted the separate legal personality of a corporation was a case where a corporation successfully asserted a right under the U.S. Constitution.⁸⁵ Generally, rights are only available to persons. On what basis, then, would we say that a corporation is a rights-holder under the federal Constitution (and, presumably, the state constitutions as well) without being subject to the responsibilities of citizenship writ large? Is this not the epitome of “blow[ing] hot and cold”⁸⁶ in the same breath? Interestingly, Professor Hasnas does not challenge the ruling in *Dartmouth*,⁸⁷ but instead focuses attention only on a case from 90 years later.⁸⁸ Generally, rights come with the concomitant responsibility to respect the rights of others. Yet, if the argument of Professor Hasnas is to be believed, a case from 1819 which indicates that corporations are rights-holders is correctly decided,⁸⁹ yet his article challenges the very idea that the criminal law – a legal statement which Professor Hasnas himself admits is a moral one – cannot place responsibilities on rights-holders that happen to be corporations. As is likely already evident, I simply cannot agree that, whatever the flaws of the criminal justice system of the most powerful nation on Earth, it must necessarily follow that holding corporations liable for serious criminal wrongdoing is not ethically and legally defensible.

⁸⁴ It is interesting to note also that under current Canadian statutory criminal law (to be discussed in more detail below), “organizations” which have not historically been recognized as having separate legal personality (such as partnerships) are also subject to potential criminal liability. It would appear that the same is true in the United States. On this point, see Ainslie, *supra* note 3, discussing the prosecution of Arthur Andersen LLP, a partnership.

⁸⁵ See *Dartmouth*, *supra* note 64.

⁸⁶ *Kosmopoulos (SCC)*, *supra* note 71 at 11.

⁸⁷ *Supra* note 64.

⁸⁸ *New York Central & Hudson River RR Co v United States*, 212 US 481 (1909) [*New York Central*], *per* Justice Day, writing the opinion of the Court.

⁸⁹ To be fair, Professor Hasnas does not explicitly say that *Dartmouth* was correctly decided. However, he does cite the decision and expresses no disagreement with its result. Therefore, in my view, he does not challenge the validity of the judgment, while he does challenge the validity of the *New York Central* decision.

B. CORPORATE CRIMINAL LIABILITY IS DESIGNED TO PUNISH THE INNOCENT

This is perhaps one of the stranger arguments the Professor Hasnas uses in his article. In this section, he begins by recognizing that most, if not all, criminal convictions have effects on innocent parties close to the convicted person.⁹⁰ In order to distinguish corporate criminal liability from criminal liability generally, therefore, Professor Hasnas claims that the difference is that the entire purpose of corporate criminal liability is to punish a party that has done nothing wrong. He tackles this from two different vantage points. First, he looks at the corporation itself. Then, he looks to the shareholders of the corporation. Although Professor Hasnas is not always clear on this point, for our purposes, we will deal with these two sub-arguments separately.

1. *The Corporation*

In his discussion of why corporate criminal liability does not serve any of the recognized purposes of punishment, Professor Hasnas writes as follows:

In the Anglo-American criminal justice system, deterrence refers to inflicting punishment on a wrongdoer to discourage others from committing similar offenses.⁹¹

The footnote at the conclusion of this sentence further illuminates and clarifies his meaning:

This form of deterrence is sometimes referred to as, general deterrence to distinguish it from specific deterrence or incapacitation. Specific deterrence refers to punishing a wrongdoer to discourage or prevent that particular individual from committing future offenses. Because in the present context the distinction between general and specific deterrence is immaterial (both justify inflicting punishment only on a wrongdoer), I have chosen not to break specific deterrence out as a separate justification for punishment. Further, there is really no point to discussing specific deterrence in the context of corporate criminal liability, because, by hypothesis, the parties being deterred are not the parties who actually commit the offense.⁹²

In my view, there are at least two arguments in response to this claim of Professor Hasnas. One would focus on substantive criminal law, namely, party liability for aiding and abetting the commission of a crime. The second response is more technical in that it sees an unacceptable circularity to the argument. Let us consider each of these in turn.

⁹⁰ Hasnas, *supra* note 1 at 1339.

⁹¹ *Ibid.*

⁹² *Ibid* at 1339, n 41.

a. *Substantive Criminal Law*

Substantively, one need not have committed an act that is “wrongful” independent of the wrong of another, in order for the criminal law to apply. For example, the driver of the getaway car is legitimately charged for aiding and abetting the bank robbers that he is helping to escape.⁹³ There is nothing inherently wrongful in driving a vehicle. It is only when that driving is combined with the intent to assist another that makes the act of driving criminal. The rule of corporate criminal liability extends a similar analogy between the human actor who will actually commit the *actus reus* with the appropriate *mens rea*, on the one hand, and the corporation for which he or she is acting as an agent, on the other.

Simple encouragement of the act of another may expose one to the full liability for the crime,⁹⁴ even though one may not receive any tangible benefit from the crime undertaken. With respect to corporate criminal liability, on the other hand, there are two connections that may not exist in the ordinary “aiding and abetting” party liability that would extend between human actors. There must be an agency relationship between the corporation on the one hand, and the human actor who undertook the *actus reus* with the requisite *mens rea*. The criminal activity cannot itself create the agency relationship that justifies the attribution of the agent’s crime to the corporation. Put another way, the pre-existing agency relationship may help to justify the attribution.

But perhaps even more importantly, there is a second element at play here. The agent must act as such in undertaking the criminal behaviour. Generally, without some tangible benefit to the corporation from the crime undertaken (whether intended or actual),⁹⁵ there is little reason to say that the individual is acting as an agent.⁹⁶ The getaway driver need not be an agent of the robbers (in the sense that the getaway may be unable to affect the legal position of the

⁹³ *Criminal Code*, *supra* note 23, s 21.

⁹⁴ Knowledge of, or presence at, the crime of another without more will generally not be sufficient to constitute abetting the crime. See *Dunlop and Sylvester v The Queen*, [1979] 2 SCR 881, [1979] SCJ No 75, *per* Justice Dickson (as he then was), for the Court [*Dunlop and Sylvester*].

⁹⁵ *Canadian Dredge & Dock*, *supra* note 37 at 692.

⁹⁶ *Eastern Chrysler Plymouth Inc v Manitoba Public Insurance Corp*, 2000 MBQB 66; [2000] 7 WWR 643; 146 Man R (2d) 231; 20 CCLI (3d) 201; [2000] MJ No 247, *per* Justice Morse.

robbers, as required by general agency law).⁹⁷ Similarly, in general party liability, there is no requirement that in order to be a party to the offence, the getaway driver must benefit by his or her involvement in the offence. Thus, these two interrelated issues that are present in organizational criminal liability may also help to justify the attribution of the crime to the organization that seeks to benefit financially from the very acts that Professor Hasnas claims cannot be attributed to it.⁹⁸

Smart people have told me that the correlation between organizational criminal liability on the one hand, and party liability on the other, may not be as direct as I might want it to be for the purposes of this argument. Even if this is true, there is a different approach. Party liability, counselling liability, conspiracy liability, and liability for criminal attempts are pragmatic concessions against the very sort of absolutism that underpins the argument that Professor Hasnas is putting forward. Criminal law is not watertight. Perhaps an example will help demonstrate this. Section 348 of the *Criminal Code* reads in part as follows:

348(1) Every one who

(a) breaks and enters a place with intent to commit an indictable offence therein,

(b) breaks and enters a place and commits an indictable offence therein, or

(c) breaks out of a place after

(i) committing an indictable offence therein, or

(ii) entering the place with intent to commit an indictable offence therein, is guilty

(d) if the offence is committed in relation to a dwelling-house, of an indictable offence and liable to imprisonment for life, and

(e) if the offence is committed in relation to a place other than a dwelling-house, of an indictable offence and liable to imprisonment for a term not exceeding ten years or of an offence punishable on summary conviction.⁹⁹

⁹⁷ See Gerald Fridman, *Canadian Agency Law*, 2nd ed (Toronto: LexisNexis Canada Inc, 2017), § 1.2; see also Cameron Harvey & Darcy MacPherson, *Agency and Partnership Law Primer*, 5th ed, (Toronto: Thomson Reuters Canada Ltd, 2016) at 1, citing an earlier agency text by Fridman that uses the same definition.

⁹⁸ To be clear, I am in no way arguing that agency alone is the best standard for the attribution of acts of individuals to organizational actors. Instead, my point is to deal with the argument of Professor Hasnas that the corporation is not a wrongdoer. The point is simply that even at its lowest point, organizational criminal liability has requirements that general party (aiding and abetting) liability does not.

⁹⁹ *Criminal Code*, *supra* note 23.

One can imagine a scenario where two accused persons are charged under this section. The first might claim that he damaged the front door of a building, but he never entered the building. While there may be a charge for wilfully damaging property, he would argue that s. 348 does not apply. At the same time, the second individual (the “entrant”) simply walked into the building. Certainly, if the entrant committed an indictable offence¹⁰⁰ while in structure, he can presumably be charged with that offence. But, the entrant may argue that he cannot be convicted under s 348 either, because the entrant did not break into the structure.

Yet, for me, there is no question that the criminal law is not that formalistic. While there is a libertarian bias in the criminal law, it is not so extreme that having a different actor break down the door should fundamentally alter the offence with which one can be charged. In fact, there is also s 21(2) of the *Criminal Code*, which reads as follows:

21(2) Where two or more persons form an intention in common to carry out an unlawful purpose and to assist each other therein and any one of them, in carrying out the common purpose, commits an offence, each of them who knew or ought to have known that the commission of the offence would be a probable consequence of carrying out the common purpose is a party to that offence.¹⁰¹

I suspect that in the hypothetical posited above, the court would likely deploy to hold both actors liable under s 348 and for the underlying indictable offence committed by the entrant, even the other party did not know what offence the entrant might commit while inside the building, such as a theft of materials inside.

The ability to convict each actor of some offence does not prohibit greater liability. Similarly, the clear liability of the corporate agent does not, in my view, prevent or even diminish the liability of the corporate entity. The analogy may not be perfect, but the law (created, as it is, by and for fallible human beings) is not perfect either. But the law does try, in spite of all of its imperfections, to get to an answer that is, on the whole, defensible to those in the jurisdiction. Corporate criminal liability is, for me, an example of one such area of law. It is far from perfect, but it is defensible.

¹⁰⁰ This is the more serious type of offence, as compared to offences of summary conviction. The rough equivalents in American jurisprudence are felonies and misdemeanors. However, in Canada, there are offences where the Crown (the prosecutor) is given the right to elect whether to proceed summarily (less serious punishment) or by indictment (more serious punishment is possible).

¹⁰¹ *Supra* note 23, s-s 21(2).

b. *The Circularity of the Argument*

While Professor Hasnas and I may disagree on the substantive criminal law, there is a more profound reply to his argument. He in essence asserts that a corporation is not a wrongdoer, and then uses this assertion as proof that corporate criminal liability is inappropriate. However, this is a completely circular argument. Because there are no rules that, for Professor Hasnas at least, legitimately allow the law to call a corporation a “wrongdoer”, the corporation is not, for Professor Hasnas, a “wrongdoer.” He then uses this “no wrongdoer” label to justify his conclusion that corporate criminal liability is misplaced.

In other words, this seems to be a significant disconnect in Professor Hasnas’s argument here. On the one hand, his argument appears to be that no corporate criminal liability attribution rules will ever be appropriate. But it is the very absence of these rules that allow him to argue that a corporation is not a “wrongdoer.” Late in his paper, Professor Hasnas tries to make suggestions about what appropriate rules might look like (though, as discussed further below,¹⁰² he finds other alternatives to be inappropriate as well). But, at this point in his paper, it seems fairly evident that Professor Hasnas’s argument is that criminal punishment is entirely inappropriate for corporations or other collective entities. For that argument to be successful, one cannot, in my view at least, ignore the current rules, label the corporation as not being a “wrongdoer”, and then justify an argument that the criminal law aimed at corporations and other collective entities is wholly inappropriate on that basis alone.

2. *The Shareholders*

It seems as though the genuine concern of Professor Hasnas is the “punishment” that may apply to innocent shareholders. While not all shareholders are necessarily innocent,¹⁰³ I can agree that often shareholders (particularly in larger, publicly-traded corporations) are unaware of the wrongdoing of corporate management that may lead to corporate criminal liability.

On this point, Professor Hasnas writes as follows:

Who pays when a financial loss is imposed upon a corporation? To the extent that such a loss cannot be passed along to consumers, it is the owners of the corporation, the shareholders, who incur the penalty. The defining characteristic of the modern corporation is the separation of ownership and control. The shareholders, who own

¹⁰² See Part V, below.

¹⁰³ For example, individual wrongdoers may also be shareholders of the corporation involved in the wrongdoing.

the corporation, have no direct control over or knowledge of the behavior of the corporate employees who commit criminal offenses. Hence, inflicting punishment on a corporation's shareholders is punishing those who are personally innocent of wrongdoing for the offenses of others. How can punishing the innocent advance any of the legitimate purposes of punishment? It cannot.¹⁰⁴

Let my argument to follow be misunderstood, let me say at the outset that I accept that punishing the morally innocent cannot serve any reasonable goal of punishment. However, that does not mean that I accept the idea that we are punishing shareholders. In order to explain this argument, we need a working definition of "punishment". For my purposes, I accept the definition provided by Professor Andrew von Hirsch in his 1993 book *Censure and Sanctions*.¹⁰⁵ In essence, punishment comprises two elements. The first is "hard treatment." This is a prudential disincentive against further offending. Fines, imprisonment or probation orders can all serve this function.¹⁰⁶ There is no doubt that shareholders may suffer negative consequences when a corporation is convicted of a serious crime.

Professor Hasnas seems genuinely worried that an innocent shareholder's money will be used to pay fines by a corporation adjudged criminal. This, he finds problematic. I would agree with him if, in fact, the money belonged to the shareholders. It does not. This is the essence of the separate legal personality of the corporation.

The first act of the relationship between the putative shareholder and his or her corporation is transactional in nature. The shareholder must agree to part with money, or money's worth.¹⁰⁷ In return, the corporation agrees to provide the shareholder with certain rights as against the corporation. Those rights are set out in the form of share conditions, as part of the main

¹⁰⁴ Hasnas, *supra* note 1 at 1339.

¹⁰⁵ Andrew von Hirsch, *Censure and Sanctions* (Oxford: Clarendon Press, 1993) [von Hirsch, *Censure and Sanctions*].

¹⁰⁶ *Ibid* at, *inter alia*, ch 7.

¹⁰⁷ See the CBCA, *supra* note 61, s-s 25(3). There are equivalent sections in the vast majority of the provincial counterparts to the CBCA. On the latter point, see also the *Business Corporations Act* (Alberta), *supra* note 61, s-s 27(3); *The Business Corporations Act* (Saskatchewan), *supra* note 61, s-s 25(3); *The Corporations Act* (Manitoba), *supra* note 61, s-s 25(3); *Business Corporations Act* (Ontario), *supra* note 61, s-s 23(3); *Business Corporations Act* (New Brunswick), *supra* note 61, s-s 23(5); *Corporations Act* (Newfoundland and Labrador), *supra* note 60, s-s 50(1); *Business Corporations Act* (Northwest Territories), *supra* note 61, s-s 27(4); *Business Corporations Act* (Nunavut), *supra* note 61, s-s 27(4); and *Business Corporations Act* (Yukon) *supra* note 61, s-s 28(3).

incorporating document¹⁰⁸ of the corporation.¹⁰⁹ Only someone who is completely willing to ignore the separate legal personality of the corporation can argue that the innocent shareholder is being asked to pay the fine that would be associated with criminal behaviour on the part of the corporation. Speaking for myself, I accept this separate legal personality and the transaction – that is, the purchase of the share – as givens, not because the law says that I must (though that would probably be sufficient for my purposes), but because the shareholder needs the share in order to have rights, and to assert those rights as against the corporation. The very status as shareholder is a necessary precondition for him or her to have any interest in the operation of the corporation at all. Therefore, I have some trouble with the idea that money with which the shareholder has willingly parted nonetheless remains “his” or “hers” (as the case may be) for some purposes, including to support Professor Hasnas’s argument.

The next part of this argument might be that the value of the share will be negatively affected. Undoubtedly, this is true. Any fine or other negative financial consequence is likely to be reflected in stock price, at least to the extent that the market on which the stock is traded is an efficient one. However, again I am less concerned about this than it would appear Professor Hasnas is. As mentioned earlier, Professor Hasnas is worried about those shareholders who do not have a meaningful voice in corporate governance issues, and therefore have no meaningful option to prevent the criminal wrongdoing that leads to the fine or other financial consequence for the corporation. The reason I am less worried that my American counterpart is that, in my view, this is inherent in the very nature of speculation. Where one has no power to prevent wrongdoing, one is generally speculating. Shareholders are rarely heard to complain as to why their stock went up in value; more often than not, they are simply pleased that it appreciated. It seems to me that when what is willing to accept appreciation no matter what its source, generally, the same should apply to depreciation.

Furthermore, even if I were willing to accept the argument that hard treatment were being visited upon innocent shareholders, it does not

¹⁰⁸ Under e.g. the *CBCA*, *ibid*, the “primary incorporating document,” as that term is used here, is called the “articles of incorporation.” See *CBCA*, s 6. This is followed in the majority of other Canadian common-law jurisdictions, but in some Canadian jurisdictions the same document is called a “memorandum of association” (confusingly, with a secondary document akin to by-laws referred to as “articles of association”) or “letters patent.” See VanDuzer, *supra* note 56 at 115, n 92.

¹⁰⁹ See VanDuzer, *ibid* at 225.

necessarily follow those shareholders are being punished. The second element of punishment, at least according to von Hirsch, is that of censure.¹¹⁰ Censure is a negative moral judgment made with respect to a person, that is, in this context, a judgment that the person is actually worthy of moral blame.¹¹¹ There have been many corporate scandals in recent decades. Would one really suggest that the individual shareholders of Enron were worthy of moral blame? Was any moral blame actually visited upon any of them? It is this moral judgment, in my view, that separates negative impacts from true punishment. If we are looking for the quintessential example of morally blameworthy behaviour in a corporate context, for my money, that honour belongs to the Ford Motor Company in the Pinto disaster.¹¹² While ultimately no criminal punishment was visited upon Ford after trial in Indiana for reckless homicide,¹¹³ this still stands out as a quintessential case of true criminal law that was applied to corporate wrongdoing.¹¹⁴ Would anyone attempt to argue that what the shareholders of Ford did with respect to the Pinto subjected them to moral scrutiny of any kind? I think not. If the shareholders of Ford were not subject to any censure, it then follows that they were not punished within the criminal-law sense of the word.

In fact, it is this censure element that is the most important distinction between criminal liability, on the one hand, and tortious responsibility, on the other. In both cases, the financial loss to the corporation occurs, as does the loss of share value. But no one would suggest that tortious liability, dependent

¹¹⁰ von Hirsch, *Censure and Sanctions*, *supra* note 105 at 9.

¹¹¹ *Ibid.*

¹¹² See Lee Patrick Strobel, *Reckless Homicide? Ford's Pinto Trial* (South Bend, Ind: And Books, 1980). The author of this volume explains how in fact the law of evidence was successfully used to avoid punishment for Ford.

¹¹³ *Ibid.*

¹¹⁴ For readers who may not know the story of the Ford Pinto, executives of the American carmaker began to construct the manufacturing machines for this particular car – a process referred to as "tooling" – before testing on the prototypes was complete. After tooling had started, safety testers discovered that the design of the Ford Pinto meant that if the car was struck from behind at a speed greater than 31 miles per hour, it was very likely that the collapse of the back bumper would follow. This, in turn, would likely cause the fuel tank to be punctured. The resulting leakage of fuel would create a very high fire risk. Not only that, but it was also later discovered that a collision could cause the doors of the car to jam shut, trapping occupants inside. The Board of Directors at Ford was therefore confronted with a choice: do we fix the problems by recalling millions of vehicles, or do we simply pay out damages to the victims who may come forward from time to time? At the time, the Board of Directors of Ford chose the latter option. See Douglas Birsch & John Fielder, eds, *The Ford Pinto Case: A Study in Applied Ethics, Business, and Technology* (Albany: State University of New York Press, 1994).

as it is on vicarious-liability principles, should not be visited upon corporations or other collective actors. It is the censure element of the criminal law that places it on a different footing that its tortious cousin.

Perhaps we need to discuss the communicative element of censure in greater detail. While every deprivation (economic or otherwise, though clearly, the former is more relevant in the case of organizational criminal liability) is “hard treatment” in the sense that von Hirsch uses the term, censure is inherently an expressive and hopefully communicative process.

The difference between these two is perhaps best expressed by Andy Engen.¹¹⁵ A communicative theory, at least as Engen understands the concept, is one where the subject of the message (in this case, the criminal offender being punished) is an active participant in the process. The subject must accept the validity of the message and take it to heart. An expressive theory, on the other hand, is not necessarily seeking any particular response from the subject of the expression.

In the case of criminal liability, the expressive function of the censure¹¹⁶ demands that the law attempt to express to the offender not only that the act was worthy of a redistributive response (generally considered the province of the law of contracts,¹¹⁷ torts,¹¹⁸ and restitution¹¹⁹) but that a condemnatory response (inherently contained within the criminal law) is also justified.¹²⁰

While it is not absolutely necessary to resolve the distinction between the expressive view of censure and the communicative theory here, it is related to the argument. By accepting the expressive view, censure is defined as a “one-

¹¹⁵ Andy Engen, “Communication, Expression, and the Justification of Punishment” (2014) 1 Athens J of Hum & Arts 299.

¹¹⁶ Engen places von Hirsch in the expressive camp (as opposed to the communicative camp) with respect to his theory of criminal punishment. See Engen, *ibid* at 304, n 1.

¹¹⁷ It is generally accepted that the most important role of the expectation level of damages in contract is to be the means by which the non-breaching party is placed in the position that this party would have been in, had the breach of contract not occurred. See John D McCamus, *The Essentials of Canadian Law – The Law of Contracts*, 2nd ed (Toronto: Irwin Law, 2012) at 873.

¹¹⁸ Again, it is generally accepted that the most important role of the compensatory damages in tort is to place the injured party in the position had the tort not occurred. On this point, see Philip H Osborne, *The Essentials of Canadian Law – The Law of Torts*, 5th ed (Toronto: Irwin Law, 2015) at 13-14.

¹¹⁹ For example, the purposes of fiduciary law are both prophylactic and restitutionary. See 3464920 *Canada Inc v Strother*, 2007 SCC 24 at paras 75-76, [2007] 2 SCR 177 *per* Justice Binnie, for the majority of the Court.

¹²⁰ This is not to say that punitive damages cannot be applied in contracts and tort (clearly, in each case, it is possible). Rather, the point is that the primary purpose of the use of damages in most cases is compensatory, not condemnatory, in nature.

way street". What the law is trying to say is valid, even if the offender does not respond to the message appropriately, or at all. However, from my point of view, the distinction between expressive theories, on the one hand, and communicative theories of censure, on the other, is not stark as Engen might seem to suggest.¹²¹ After all, society needs to make the attempt to communicate with the offender. To do so, society must express itself, which it does through the criminal law. However, the *prima facie* validity of the communication should not be determined by the *ex post facto* reaction of the individual offender. Therefore, the reaction of the alleged offender cannot be a necessary component of the validity of the punishment. One way to think of it might be as follows: If one could only find a breach of contract where the supposedly breaching party agreed that the damages would alter the party's behaviour, no one would ever admit to a breach.

Thus, for me, I begin with the idea that only expression (and not communication) is a requirement for punishment. This way, the desire to express moral condemnation by the state is sufficient to legitimize the institution of criminal punishment. But I would not end there. I believe that communication is still the goal. Ideally, offenders will respond in a meaningful way to the message of condemnation delivered by the state. But the state's right to punish is not limited to those situations where the offender choose to cooperate with the intended communication. Rather, the successful expression plus a genuine attempt to communicate by the state constitutes complete censure, as required for valid punishment.

The condemnatory response of the general criminal law is no less the case in organizational criminal liability. To be fair to Professor Hasnas, I am convinced that he would argue that the corporation did nothing to warrant a condemnatory response. The problem with this is that in both the economic literature and the legal literature, the corporation is an institution. There has been significant economic review of the corporation as an economic actor. The firm itself is a subject of study.¹²² The corporation is required to pay taxes on its activities.¹²³ It is not simply an alias for the shareholders.¹²⁴ As an economic actor, a corporation is presumed (at least by economists) to be economically

¹²¹ Engen, *supra* note 115.

¹²² See Ronald H Coase, "The Nature of the Firm" (1937) 4:16 *Economica* 386. Professor Coase would go on to win the Nobel Prize in Economics in 1991, based in part on this contribution.

¹²³ See *Income Tax Act*, *supra* note 35.

¹²⁴ See Salomon, *supra* note 58.

rational, similar to an individual,¹²⁵ meaning that it will pursue its own interests.¹²⁶ Thus, both the law and economic principles believe that a corporation acts. If that is so, then it follows that to suggest that the corporate does not act solely for the purpose of the criminal law seems a very narrow exception, and, for my money, an unnecessary one.

If there is no morally expressive response needed from an organizational offender, this may also be another answer to the argument of Professor Hasnas that organizations are incapable of moral suasion, and therefore, immune to punishment. The argument (discussed above) suggests that the inability of the corporation to be affected by the moral statement of the state means that there is a missing element of punishment. However, if punishment is defined by the expressive nature of the condemnatory message from the state, and not necessarily its effect on the offender, this means that as long as the expressive content can be understood by someone – it is a fair question whether the organization needs to be able to understand that expression – valid punishment may be said to exist.

Discussion of a further issue is necessary here. Professor Hasnas writes as follows:

Hence, its sanction should be applied only where doing so advances the purpose of punishment. Unfortunately, precisely what constitutes the purpose of punishment remains a matter of perennial dispute among legal theorists and philosophers. One school of thought argues that it is retribution, the process of requiting evil with evil in which harm is imposed on a wrongdoer in recompense for or in dissipation of the harm that he or she has done. Another school of thought argues that the purpose of punishment is deterrence, which involves inflicting an evil on a wrongdoer to discourage others from committing similar wrongful acts. Some scholars argue that the purpose of punishment is rehabilitation, which involves imposing treatment designed to reform one's character on a wrongdoer to ensure that he or she will behave better in the future. But regardless of which one (or combination) of these schools of thought is correct, punishment is justified only if it serves at least one of these purposes.¹²⁷

In the end, this is a rather emaciated version of punishment. Now, Professor Hasnas says that he is not meaning this to be an exhaustive list of the purposes of punishment. But he does not consider other potential purposes.¹²⁸ Canada operates somewhat differently. The *Criminal Code*¹²⁹ provides as follows:

¹²⁵ VanDuzer, *supra* note 56 at 125-126.

¹²⁶ See Bakan, *supra* note 37.

¹²⁷ Hasnas, *supra* note 1 at 1336 [footnotes omitted].

¹²⁸ *Ibid* at 1339-1340.

¹²⁹ *Supra* note 23.

718 The fundamental purpose of sentencing is to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

- (a) to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;
- (b) to deter the offender and other persons from committing offences;
- (c) to separate offenders from society, where necessary;
- (d) to assist in rehabilitating offenders;
- (e) to provide reparations for harm done to victims or to the community; and
- (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community.¹³⁰

One sees much in the definition that is absent in the viewpoint of Professor Hasnas. We need to protect society. We need to inculcate respect for the law. All sanctions need to be just. We need to denounce unlawful conduct. We need to provide reparation to victims, and public acknowledgement of the harm done. This is a much more fulsome series of justifications for punishment. As such, organizational criminal liability can be, and in my view is, justified by these other purposes. Finally, Professor Hasnas maintains:

Thus, if the relevant public harm can be avoided, by means of civil or administrative remedies, these must be employed in lieu of the criminal sanction. This condition ensures that the moral stigma associated with a criminal conviction is reserved for behavior that genuinely merits it.¹³¹

On the contrary, publicity and the resulting stigma are the major differences between civil remedies and criminal liability. The criminal law is not a matter of last resort. Instead, it is the state's most powerful method of publicly declaring wrongdoing. The difference between workers' compensation dealing with workplace fatalities,¹³² on the one hand, and the law of manslaughter by criminal negligence,¹³³ on the other, is a meaningful example.¹³⁴ If we simply say that there was a claim under workplace safety

¹³⁰ *Ibid*, s 718.

¹³¹ Hasnas, *supra* note 1 at 1337.

¹³² See e.g. the *Workplace Safety and Insurance Act*, 1997, SO 1997, c 16, Schedule A; and *The Workers Compensation Act*, CCSM c W200 (for examples of statutes that provide for such compensation).

¹³³ See *Criminal Code*, *supra* note 23 at para 222(5)(b).

¹³⁴ An example of this distinction was the Westray mining disaster. Twenty-six miners died after an underground explosion in a coal mine that was easily preventable, but where no single individual could be found to have been the clear "cause" of the explosion to the point that although multiple people were involved in a series of decisions that led to the explosion, none met the definition of "criminal negligence," because none showed a "wanton or reckless disregard for the lives or safety of other persons". See *ibid*, s-s 219(1).

legislation, this does not have the same visceral reaction as does describing the corporation as a “criminal.” For me, this visceral reaction tells me (and, I believe, the average person who hears it) that there is an appreciable amount of wrongdoing.

Now, to find some common ground with Professor Hasnas, if someone could convince me that a moral message was trying to be delivered to the shareholders of corporate wrongdoers by society when we fine the corporation, this would represent meaningful censure, that is at least in some cases, undeserved, and would be a reason to reconsider organizational criminal liability, along the lines advocated by Professor Hasnas. But the moral message is not for the shareholders. It is for the corporation, and those who have meaningful control over the activities of a corporation, namely, its directors and officers.

But even in the case of the directors and officers, another key element of the criminal liability is missing. This is that criminal law is fundamentally public in nature. This is particularly true of the sentencing phase of the criminal trial. Unlike contractual or tortious damages, a defendant (whether individual or corporation) cannot negotiate their way into privacy with respect to wrongdoing that falls in the criminal sphere. Even a negotiated guilty plea must be approved by the court, and it is, in this sense at least, public. Though the conviction of the corporation is public, the names of officers of the corporation are not publicized as a direct result of the conviction of the corporation.¹³⁵

Professor Hasnas does make one other interesting point in the excerpt reproduced above. He points out that employees and other creditors may suffer for the wrongdoing of corporate managers. Again, he is correct. However, as we will talk about later, to accept this argument is to suggest that corporations can become “too big to fail,” and that the more people negatively affected by a criminal conviction of a corporation, the less likely that prosecutors should reasonably expect to hold them to account through the criminal law. As the failures of U.S.-based automakers and investment bankers make clear, there is no such thing as “too big to fail” without serious consequences. The quote also could be taken as suggesting that small firms can be subject to the criminal law (because the number of innocent people affected will presumably be smaller), and larger firms should not. As will be discussed more below, as the size of the firm increases, the reputation of the firm may assist in the carrying out of the criminal wrongdoing.

¹³⁵ Admittedly, under the CBCA, *supra* note 61, s-s 106(1), there is a Notice of Directors that is made publicly available. Thus, it is possible to discover the names of the directors.

While employees are a special kind of creditor, in the sense that they hold very little power to control the organization, and yet are critical to its survival, and even more so to its success, the reality remains that they are creditors of the corporation. They may very well rely upon the corporation to provide them not only with their salary, but with all the positives (financial or otherwise) that come with being a working, productive member of society.¹³⁶ While employees of disgraced firms may feel unfairly targeted, especially where there is job loss,¹³⁷ in my view, there is no moral message delivered that innocent employees are somehow to blame for the wrongdoing of other employees, directors or officers.¹³⁸

Even if a number of individuals may feel justified in blaming innocent corporate employees, this is not the censure with which the criminal law is concerned. Rather, the criminal law is concerned with censure delivered by the state itself. Typically, this censure is public in nature. With respect to innocent employees of disgraced firms who have lost their jobs, there is more often a sense of sympathy that they have been caught up in events that are beyond their control, not a sense of moral blame.

Put another way, Professor Hasnas's argument is that the intention of the entire institution of corporate criminal liability is to place blame on those who are blameless. Even if I accept his argument about who is blameless, I still cannot accept the purpose of corporate criminal liability is to place blame there. Rather, once we accept the blame can be placed on a corporation, just as the separate legal personality of the corporation separates the money of the corporation from that of its shareholders, it equally separates morally blameworthy conduct of a corporation from that of its innocent shareholders.

3. *Abuse by Prosecutors*

The next argument that Professor Hasnas advances is that corporate criminal liability stands rife for prosecutorial abuse: The following two paragraphs provide the substance of his argument on this point:

¹³⁶ To be clear, I am not attempting to suggest that working in the paid workforce is the only way to be a productive member of society. There are clearly other ways to do this. However, the Supreme Court of Canada has recognized the non-pecuniary benefits of taking on a steady occupation. See judgment of Chief Justice Dickson (dissenting, but not on this point) in *Reference Re Public Service Employee Relations Act (Alta)*, [1987] 1 SCR 313 at 386, 38 DLR (4th) 161.

¹³⁷ See Laufer, *supra* note 63 at 44-45.

¹³⁸ In fact, there is certain special protections for employees. See e.g. the CBCA, *supra* note 61, s 119.

The *New York Central* standard places no limitation on prosecutorial discretion. Under it, corporate criminal liability is strict vicarious liability. Anytime a corporate employee acting within the scope of his or her employment violates the law, the corporation is guilty of an offense as well. This gives prosecutors *carte blanche* as to whether to charge a corporation in addition to the culpable individual employee.

With regard to the decision to charge the individual employee, prosecutorial discretion is limited by the elements of the offense. The need to generate the evidence sufficient to establish the required physical and mental elements of the crime restrains the prosecutor's ability to file charges. But with regard to the decision to charge the corporation, there are no additional legally required elements that the prosecution must establish. No new evidence is necessary. This means that the prosecutor may decide to charge the corporation or not at his or her whim.¹³⁹

My genuine concern with respect to these two paragraphs is that they contradict each other. On the one hand, Professor Hasnas claims that individuals are sufficiently protected against prosecutorial abuse by the nature of the offense with which they are charged, which, presumably, means that the elements of the *actus reus* place limits on the ability to convict the individual. Yet, when it comes to the corporation, according to Professor Hasnas, these limits are insufficient to protect a defendant against the same prosecutorial overreach and other misfeasance (unjustified failure to act) or malfeasance (acting poorly). Again, I simply cannot agree. Even if prosecutors chose not to charge the culpable individual employee, it is entirely within a corporate defendant's right to say that the prosecutor is required to prove the wrongdoing of the culpable employee. If the protections are sufficient for an individual, why are they insufficient for corporations?

Perhaps a simple example may assist here. If prosecutors wish to charge a corporation or other organizational offender with, say, fraud,¹⁴⁰ prosecutors must be able to point to a single culpable agent of the corporation who has committed the requisite *actus reus* of fraud, along with the requisite *mens rea*, even under American system of *respondeat superior* (very close to vicarious liability) for corporate criminal liability that Professor Hasnas is analyzing in his article. In fact, it may even be that Professor Hasnas himself undermines his own argument here. He admits that there is a need to generate evidence as to the physical and mental elements of the offense with respect to the individual. But that same evidence must be generated in order to convict the corporation.

If what Professor Hasnas means is that the same evidence that convicts the individual may be used to convict the corporation – that is, no new evidence is needed to be able to convict the corporation separate and apart from the

¹³⁹ Hasnas, *supra* note 1 at 1342.

¹⁴⁰ *Criminal Code*, *supra* note 23, s 380.

culpable employee, he is correct (other than, of course, proving that the culpable individual is an agent of the corporation, and was acting as such in carrying out the offense). But again, this is the same as party liability for aiding and abetting a crime. If the prosecutors can prove, first, that Person A committed a crime, and Person B encouraged Person A to commit that crime, this is in itself sufficient in many cases to convict Person B of the underlying offense. No particular connection between the parties to the offense need be shown.

Perhaps Professor Hasnas's point is a more basic one. Perhaps he is suggesting that the corporation cannot do or say anything. Therefore, the analogy to party liability is simply inappropriate.

In response, I need only point to the separate legal personality of the corporation. The corporation operates through its agents. The corporation has put these agents in the positions that allow them to carry out any number of activities in the name of the corporation. While one may object to the vicarious nature of the liability that characterizes federal criminal law in the United States *vis-à-vis* corporations (a matter which we will discuss in more detail below, once we have dispensed with other arguments put forward by Professor Hasnas attacking the very institution of corporate criminal liability), the argument cannot extend to the point that we hold that a corporation cannot be held liable on any basis because the corporation cannot "do" anything.

Returning to Professor Hasnas is about point in this section, a second reply also suggests itself. At its core, Professor Hasnas's argument is that it is far too simple to charge, prosecute, and presumably convict, corporations. If anything, the difficulty of corporate prosecutions in the real world suggests that judges and juries take an individualistic approach to crime.¹⁴¹ To me, this is to say that triers of fact have had great difficulty applying concepts of criminal law (which are generally developed to be applied to an individual), when asked to apply them to organizations, such as corporations. The conviction of Arthur Andersen required the collective efforts of some of the most senior prosecutors from across the country.¹⁴² Would this really have been necessary if, as Professor Hasnas suggests, charging and convicting corporations, are without the necessary procedural protections?

To be fair to Professor Hasnas, he points to deferred prosecution agreements where prosecutors have arranged terms that benefit their bosses and

¹⁴¹ See Laufer, *supra* note 63 at 48.

¹⁴² *Ibid* at 47.

other people related to them.¹⁴³ This is one area where Professor Hasnas and I are in agreement. Inappropriate compensation for deferred prosecution arrangements is a problem. However, it is a problem of legal ethics. The prosecutorial guidelines¹⁴⁴ with respect to organizational offenders were never meant to allow prosecutors to reward their bosses or their universities. At the least where I am from, these would clear violations of the ethical duties of prosecutors.¹⁴⁵

It must also be pointed out that there is a problem with the example Professor Hasnas chooses being one of deferred prosecution agreements. By definition, this is not an example of corporate criminal liability. Under a deferred prosecution agreement, no corporation has been convicted. To be clear, like Professor Hasnas, I have serious reservations about deferred prosecution agreements. However, I doubt that our positions would be the

¹⁴³ Hasnas, *supra* note 1 at 1342–1343.

¹⁴⁴ See Laufer, *supra* note 63 at 62–64.

¹⁴⁵ See e.g. *R v Boucher*, [1955] SCR 16 at 23–24, [1954] SCJ No 54, *per* Justice Rand, where he holds that a prosecutor’s most important concern is upholding the law. A prosecutor is supposed to be concerned with pushing the evidence to its full strength, but is not to be concerned with concepts like victory and loss. His words read as follows: “It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength but it must also be done fairly. The role of prosecutor excludes any notion ‘of winning or losing; his function is a matter of public duty which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.”

This is specifically in contradistinction to the view of some U.S. prosecutors, at least according to one commentator. He writes the following: “Under current practice, apart from evolving DOJ internal guidelines, there is little by way of systemic checks on the overly-aggressive, misinformed, or unethical prosecutor. The imbalance in power between the two sides places enormous weight on two things that are both in the exclusive discretion of the government. First, the system counts on the government attorney ethically wielding her power and not threatening indictment simply to coerce a favorable settlement. Save for her personal integrity, a prosecutor may seek to charge for improper reasons, such as personal or political advancement, or exact sanctions that are unwarranted, such as fines disproportionate to the harm.” See Weissmann, *supra* note 10 at 1322–1323.

It is interesting to note the first set of federal guidelines with respect to organizational offenders produced by the U.S. Department of Justice were written by Eric H Holder, who would later go on to serve as Attorney General of the United States under President Barack Obama. Also, Attorney General Holder had begun his career investigating complaints of public corruption. See Eric Holder, “Comey is a good man, but he made a serious mistake”, *The Washington Post* (30 October 2016). Such investigations would clearly allow for probes into misconduct of public officials, including federal prosecutors.

same on this issue. In my view, being able to avoid prosecution by paying money is a violation of a sacred trust. As discussed earlier in this paper (and as we will discuss more later), the public nature of criminal conviction and the censure that accompanies it fundamentally are at the core of why I believe we need corporate criminal liability. In other words, I can agree with Professor Hasnas that deferred prosecution agreements are inherently troublesome. He uses their troublesome nature to argue that corporate criminal liability is entirely misplaced. I would argue the reverse. The very existence (if pushed, I would argue the very necessity) of the underlying elements of criminal law when applied to corporations necessitate that, at the very least, deferred prosecution agreements need to be rethought, and, if appropriate at all, need to be used in the rarest of circumstances.¹⁴⁶ This is because they undermine the censure-based process of criminal punishment.

In any event, prosecutors who clearly exceed their power is not a reason to question whether the institution of corporate criminal liability is appropriate. From my point of view, this is quintessentially “throwing the baby out with the bathwater.” Put another way, any institution that is as large as either the corporation generally, or corporate criminal liability specifically, will be subject to a certain degree of abuse on all sides. The fact that prosecutors may use laws as a means to perpetrate abuse does not mean that corporate criminal liability is entirely misplaced. The fiduciary responsibility of all lawyers (including, and especially, the legal and ethical obligations that are unique to prosecutors) should be enforced.

I accept the fact that there are undoubtedly excesses of authority of prosecutors, and this is certainly problematic. But, for my money, eliminating prosecutions of organizational actors altogether so that prosecutors have no opportunity to abuse the powers provided to them is akin to outlawing cars altogether as a means of preventing speeding. It will achieve the goal, but it overshoots the mark considerably. Does it not seem a more measured response to do one the following, among other options? We could either: (a) remind prosecutors of organizational actors of the ethical obligations that pertain to them; (b) create clearer ethical obligations for prosecutors of organizational

¹⁴⁶ I am sure that some readers will point out that this is not a fulsome argument about the merits or concerns with respect to deferred prosecution agreements. I would agree. My goal here is not to discuss deferred prosecution agreements in detail. My goal, rather, is to simply say that though I suspect both Professor Hasnas and myself may have significant issues with the concept, and use, of deferred prosecution agreements, his example, which makes specific reference to deferred prosecution agreements, does not, in my view, enhance his more general argument.

actors, or (c) create reform of the plea-bargaining system, either for organizational actors specifically, or on a more general basis.¹⁴⁷

In fact, there can be little doubt that corporations and other organizations have been an essential part of some of the most widespread malfeasance in recent memory.¹⁴⁸ If there is abuse of this kind, corporate criminal liability provides one set of tools to combat it. Why would we as a society turn away a set of tools?

4. *The Corporation Does Not Commit a Public Harm*

On this point, it seems as though Professor Hasnas is making two different arguments. His first would seem to be that while there is certainly a “harm”, the corporation is not the one perpetrating it. Rather, responsibility for the harm rests with the individual committing the *actus reus* with the requisite *mens rea*. Professor Hasnas writes as follows:

To begin with, the *New York Central* standard does not address a public harm because it does not address a distinct harm at all. Fraud, embezzlement, and other financial crimes do indeed threaten public harm. These offences not only cause losses for their individual victims, but also undermine the trust that allows markets to function efficiently and commerce to flourish. Because there is a societal interest in preserving the conditions that facilitate voluntary trade and cooperative ventures, there is a justification for punishing individuals who commit these offenses, whether they work for a corporation or not. But assuming the offenders do work for a corporation, how does the corporation threaten any public harm?

The harm to the societal interest in well-functioning markets is the same regardless of the context within which the fraud or other white-collar crime is committed. Punishing the corporation in addition to the individual perpetrators does punish a public harm, but it is the same public harm that is being punished by the prosecution of the individual perpetrators. Punishing the corporation is punishing the same harm twice, not punishing a distinct harm threatened by the corporation. But this is equivalent to saying that the corporation is not threatening any distinct public harm.¹⁴⁹

Fundamentally, the argument here is that there is only one perpetrator of most frauds, and, presumably, other serious crimes as well. My response to this relies again on party liability. Why do we punish those who encourage others

¹⁴⁷ Obviously, this paper is not the forum in which to tackle these broader, systemic, criminal-justice issues. I have already made reference to the Canadian jurisprudence on the ethical obligations of prosecutors. With respect to some issues around plea bargaining, see e.g. David Ireland, “Bargaining for Expedience? The Overuse of Joint Recommendations on Sentence” (2015) 38 *Man LJ* 273.

¹⁴⁸ See Celia Wells, *Negotiating Tragedy: Law and Disasters* (London: Sweet & Maxwell, 1995), c 7.

¹⁴⁹ Hasnas, *supra* note 1 at 1345.

to commit crimes, separate and apart from those who actually commit the underlying criminal offences?¹⁵⁰ The reason must be that their encouragement of the person who undertakes the *actus reus* with the requisite *mens rea* is worthy of condemnation, or censure, in the criminal-law sense. Similarly, entities that seek to profit from the work of their employees should not be allowed to avoid the consequences of those same employees behaving badly.

The driver of the getaway car can be convicted of the same offence as is the bank robber whom the driver assists.¹⁵¹ Arguably, the driver's actions have not led directly to any harm to anyone. And yet, few, if any, criminal-law scholars would argue against party liability as being a form of vicarious punishment,¹⁵² and thus unacceptable under the criminal law.

The second argument is that prosecuting the organization adds nothing to the prosecution of the individual perpetrators. Regrettably I cannot accept this argument, either. As will be expanded upon below, the simple disgorgement of profits is insufficient to demonstrate society's moral outrage and censure over the wrongdoing that has occurred. In the case of Arthur Andersen,¹⁵³ and many of the other frauds that have been prosecuted, it is the very involvement of the corporation or other collective, organizational actor – such as, in the case of Arthur Andersen, the partnership – in the business arena which permits the individual wrongdoers to be involved in wrongdoing that simply would not be possible without the activity by, and goodwill of, the corporation or other entity. Thus, if an individual wrongdoer were to attempt to convince the victims of the fraud that they should contribute to the fraudulent activity, it is very unlikely that a reasonable person would agree to do so. The size and collective

¹⁵⁰ On this point, see the *Criminal Code*, *supra* note 23 at para 21(1)(c).

¹⁵¹ *Ibid* at para 21(1)(b).

¹⁵² The meaning of the concept “vicarious liability” in this context is an important issue. This is particularly so given that Professor Hasnas takes a very expansive interpretation of the term. This expansive interpretation is, in my view at least, at the core of Professor Hasnas's rejection of any other standard of organizational criminal liability. However, these alternate standards are not at the centre of the arguments made here. This is not because these alternate standards are unimportant. Rather, these standards are sufficiently important to warrant separate treatment. Therefore, a discussion of these alternate standards will have to wait for another day.

¹⁵³ Arthur Andersen was convicted of a massive accounting fraud. The conviction and its aftermath led to the ultimate bankruptcy of this partnership. Interestingly, many of the 26,000 employees of Arthur Andersen lost their jobs as a result and complained that they done nothing wrong. See Laufer, *supra* note 63 at 44. If this prong of Professor Hasnas's argument is to be taken seriously, he is alleging that it was the intention of federal prosecutors to cause harm to 26,000 people that they had never met, presumably to do nothing more than prove a point.

nature of the collective actor (whether a corporation, partnership, or other form) and its activities is what allows the individual perpetrator to carry out the criminal activity.

Therefore, no matter how wealthy the individual perpetrators of these offences may be, without the organization to shield their activities, the scope of the criminal activities would, at least in most cases, as a common sense matter, be greatly reduced. Let me use the infamous case of Arthur Andersen as a common-sense example.¹⁵⁴ It is said that in the Arthur Andersen case the fraud resulted from the actions of a limited number of partners in Arthur Andersen's Houston, Texas office.¹⁵⁵ Accepting that as true for the sake of argument, my question is this: could anyone reasonably believe that, absent their association with what was at the time one of the world's largest accounting firms, five or even ten unknown and unnamed accountants working in a small partnership have been reasonably expected to manipulate the market to the degree necessary to perpetrate this large a fraud? If the answer to this question is “no” (as I believe it must be), and the collective of Arthur Andersen is inherently necessary to inflict the underlying level of harm that these actions allowed to bring into being, it follows that Arthur Andersen, as an actor separate and apart from the individuals involved, is a necessary part of the criminal activity. The fraud was larger because Arthur Andersen was involved. The fraud was better concealed because of the size and reputation of Arthur Andersen. Absent the involvement of Arthur Andersen, the individuals may not even have started down this road. Just like the getaway driver, the crime may have been significantly different without their involvement. Just like the getaway driver, Arthur Andersen hopes to benefit by the transactional activity of their agents.

From my perspective, therefore, the idea of visiting all of the censure for these massive frauds on one or more individuals seems disproportionate, considering the involvement of the organizational actor. Gross disproportionality in criminal sentencing of offenders is to be avoided.¹⁵⁶ In

¹⁵⁴ Interestingly, the conviction was later overturned by the Supreme Court of the United States. See *Arthur Andersen LLP v United States*, 544 US 696 (2005), per Chief Justice Rehnquist, delivering the opinion of the Court, holding that the trial judge's instructions to the jury were inadequate.

¹⁵⁵ Laufer, *supra* note 63 at 44-45.

¹⁵⁶ See von Hirsch, *Censure and Sanctions*, *supra* note 105 at 15-17.

fact, gross disproportionality in sentencing can attract constitutional protection in both Canada¹⁵⁷ and the U.S.¹⁵⁸

This gross disproportionality is particularly problematic where the corporation or other organizational entity has profited by the wrongdoing. Many economists will point out that removing all profit from illegal activity through disgorgement should discourage it.¹⁵⁹ However, for such an argument to have any normative force, it is important to recognize the probability of being caught and forced to disgorge profits must be 100%, or at least close to it. If anything about corporate criminal liability is clearly established, it is the probability of being caught is significantly less than perfect.¹⁶⁰

To the extent that it is less than perfect, there is an economic incentive for a corporation or other organization to engage in behaviour that at the very least risks serious criminal wrongdoing. This is especially true if Professor Hasnas's argument is accepted, considering that the employee who undertakes the *actus reus* with the requisite *mens rea* will bear a disproportionate amount of the punishment, that is to say, all of it. After all, if Professor Hasnas's argument is correct, there is no reason to punish the corporation or other organizational actor at all.

¹⁵⁷ See s 12 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982*, c 11 (UK) [*Charter*], which reads as follows: "Everyone has the right not to be subjected to any cruel and unusual treatment or punishment."

¹⁵⁸ See the opinion of the Supreme Court of the United States in *Kennedy v Louisiana*, 554 US 407 (2008), written by Justice Anthony Kennedy, joined by four other members of the Court. The decision finds constitutional protection against grossly disproportionate sentences pursuant to both the 8th (federal law) and 14th (state law) Amendments to the US Constitution.

¹⁵⁹ Basic neoclassical economic theory would largely assume that a person generally engages in behaviour that maximizes the preferences that the person sets of him- or herself (rather than the theory assuming particular universal preferences). On this point, see Gary S Becker, *The Economic Approach of Human Behaviour* (Chicago: University of Chicago Press, 1973) at 5. Therefore, if there is no profit to be made from the activity, to the extent that the assumption holds true, the rational economic actor (whether the corporation or other organizational actor on the one hand, or the executive or other employee engaging in the behaviour on its behalf, on the other) would have little incentive to engage in the criminal behaviour in any event.

¹⁶⁰ One need only look to the Arthur Andersen case, *supra* note 154, to see that punishment of a partnership was possible, even if the actual conviction in the case was later overturned based on a procedural error made by the trial judge. Even where the elements of the offence are arguably proven, the organizational offender may avoid punishment.

5. *Public Policy Does Not Favour Imposing Liability on Organizational Actors*

The author then turns his attention to certain quotations from *New York Central*. In particular, he cites the following:

Applying the principle governing civil liability, we go only a step farther in holding that the act of the agent, while exercising the authority delegated to him ... may be controlled, in the interest of public policy, by imputing his act to his employer and imposing penalties upon the corporation for which he is acting in the premises.¹⁶¹

Professor Hasnas claims that a reference in the case to “public policy”, that is, that the law needed to be effectively enforced was in essence tilting the scales of justice too far in favour of the state.¹⁶² He further claims that there is an “inherent liberal bias” in Anglo-American criminal law (with no less than eight examples that he cites for this purpose),¹⁶³ wherein the “deck” is supposedly – and in the view of Professor Hasnas, quite properly – “stacked” against the prosecution.

Criminal conviction should be difficult, based mainly on the use of the coercive power of the state against a single individual. Nonetheless, the examples that Professor Hasnas cites, while correct, in my view, do not necessarily support the general proposition that he puts forward. It is not necessarily wrong for the state to exercise power that makes law enforcement easier. For example, the only reason that wiretapping¹⁶⁴ is allowed is because we believe that it is a reasonable way for the state to gather evidence for the purposes of a criminal prosecution.

Thus, allowing wiretapping under any circumstances serves only one goal: it provides a reasonable method by which law enforcement can seek evidence. In fact, in the Canadian context at least, the importance of this technique is critical, in the sense that, if the investigation can proceed without wiretapping evidence, a judge is generally not supposed to issue a warrant for a wiretap.¹⁶⁵ The relative importance of the potential evidence that might be garnered by the wiretap to the request for judicial authorization (to use a wiretap in the first place) tells us the purpose of wiretapping is to allow law enforcement to do its

¹⁶¹ *New York Central*, *supra* note 88 at 494, reproduced in Hasnas, *supra* note 1 at 1348.

¹⁶² Hasnas, *ibid* at 1348–1349.

¹⁶³ *Ibid* at 1349.

¹⁶⁴ “Wiretapping” refers to the electronic interception of private communications for investigative purposes. On this point, see the *Criminal Code*, *supra* note 23, Part VI, especially s 186.

¹⁶⁵ See *ibid* at para 186(1)(b).

job. Similarly, the use of search warrants to allow the state to search for evidence at a building or other location is a critical tool of law enforcement.¹⁶⁶ I am not suggesting that there is not a civil libertarian bias in favour of criminal defendants (as alleged by Professor Hasnas) in our law, whether north or south of the Canada-U.S. border. Rather, my point is simply that there is nonetheless a balance to be struck between the importance of law-enforcement goals, on the one hand, and the civil liberties of criminal defendants, on the other. For example, the need for prior judicial authorization before conducting a search or intercepting private communications attempts to draw this balance. Professor Hasnas, in my view at least, has not even really acknowledged that some of the powers given to the police as part of the criminal are in fact designed to allow the state to detect, deter and punish criminal wrongdoing.

Thus, while there certainly is an amount of “deck-stacking” against the state within both procedural and substantive criminal law, in my view, Professor Hasnas goes too far to suggest that having any intention to promote law-enforcement goals through the criminal law is illegitimate. Public policy does sometimes make demands for a balance between law enforcement, on the one hand, and the protection of individual freedoms, on the other.

Interestingly, in my view, given that corporations cannot be imprisoned, the concept of “freedom” (at least as I perceive its use by Professor Hasnas) may not apply with the same vigour as it does when we talk about locking offenders away in prisons and penitentiaries.¹⁶⁷ When we talk about the freedom of

¹⁶⁶ See e.g. *ibid*, s 487 and following.

¹⁶⁷ In Canadian law, it is quite clear that certain of the constitutional freedoms granted to individuals are *not* extended to corporations or other entities. See, for example, *Irwin Toy*, *supra* note 21, *per* the majority (Chief Justice Dickson and Justices Lamer, as he then was, and Wilson). Interestingly, see also *R v Church of Scientology of Toronto Inc*, (1997), 33 OR (3d) 65 (CA), *per* Justice Rosenberg, for the Court, where the learned Justice held that, given that s 7 of the *Charter*, *supra* note 157 – the *very rough* equivalent to part of the 14th Amendment – did not apply, to the corporation, there was no further *Charter* protections available on these facts. This blanket conclusion is at least somewhat suspect, considering other cases from the Supreme Court of Canada, notably *R v Wholesale Travel Group Inc*, [1991] 3 SCR 154, [1991] SCJ No 79. This is not the forum in which to discuss the Canadian law on constitutional protection of business interests. This will have to wait for another day. Leave to appeal [the Canadian equivalent to a *certiorari* to the U.S. Supreme Court] was sought by the Church of Scientology in the first case referred to in the previous paragraph of this footnote. Leave was denied 9 April 1998 (*per* Chief Justice Lamer and Justices McLachlin, as she then was, and Iacobucci). In Canada, applications for leave are generally dealt with by only three members of the Court, and without oral hearing (although, recently, it has become more common for oral hearings to be held on applications for leave than it was previously, although still not common).

individuals, it is generally regarded as an inherent good, to be removed only when it is absolutely necessary.¹⁶⁸ Certain constitutional protections apply to prevent incarceration of an individual for an absolute liability¹⁶⁹ offence.¹⁷⁰ Presumably, since organizational actors are not deprived of freedom in this sense of physical restraint, the same considerations do not apply.¹⁷¹

6. *We do not expect one person to inform on another*

Professor Hasnas contends that there is an obligation on prosecutors to make their cases without corporate records or the testimony of corporate employees:

One hundred years of experience with corporate criminal liability has made the role that it plays in our system of criminal justice clear. The ability of the government to threaten corporations with criminal indictment for the offenses of their employees shifts the balance of power between prosecutor and defendant. And that is precisely the purpose of corporate criminal liability. The reason why it does not advance any of the traditional purposes of punishment is that it is not designed to punish. It is designed to circumvent the pro-defendant, liberal bias inherent in our system of criminal law.

There is no doubt that the *New York Central* standard of corporate criminal liability advances the "public policy interest" in more effective law enforcement. In general, prosecutors would have a much easier job if they could threaten to indict all those who might have knowledge relevant to their criminal investigations unless they aided in the prosecution of their fellow citizens. Generally, we do not permit this, and for good reason. It reminds us too much of the practices of the Nazi and Soviet regimes in which failure to inform on others was itself an offense. We don't want a society in which police agencies pursue their missions by turning citizens against each other.

Corporate criminal liability is the exception to this, and it is an unfortunate one, for it turns employers into the adversaries of their own employees whenever those employees come under suspicion. This may not seem harmful in cases in which the employees have, in fact, acted purposely and malevolently. But given the amorphous nature of the federal criminal law and its myriad provisions that can be violated

¹⁶⁸ See Andrew von Hirsch, *Doing Justice: The Choice of Punishments* (Boston: Northeastern University Press, 1975).

¹⁶⁹ Absolute liability is where conviction for the offence follows from the proof of the doing of the prohibited act. See *Sault Ste Marie*, *supra* note 21.

¹⁷⁰ *Reference Re Section 94(2) of Motor Vehicle Act (BC)*, [1985] 2 SCR 486, *per* Justice Lamer, as he then was, for the majority, at para 3, [1985] SCJ No 73.

¹⁷¹ However, my goals here do not include making an argument that criminal protections should not apply to corporations and other entities in a fulsome way. If that argument is to be made, it will have to wait to another day.

without awareness that one is doing anything wrong, this becomes a very harmful and destructive practice indeed.¹⁷²

I admit that I had to read this passage several times. It seems as though Professor Hasnas is suggesting that there is something nefarious about the use of what is widely known as the “prisoner’s dilemma.”¹⁷³ If there is a corporate employee with information, and that information may implicate both the employee and the organization in potential criminal wrongdoing, most participants in the criminal justice system would be unsurprised that a prosecutor might offer a deal to the individual in order to access the information and use it against the organization. In other words, from my point of view, the “prisoner’s dilemma” is just as acceptable a technique when used against one individual and an organization such as a corporation, as it is when it is used against two individuals.

One of the most disturbing analogies used by Professor Hasnas is that the use of comparisons to Soviet-era Russia and to Nazi Germany. While the metaphor is certainly evocative and passionate, it is, for me at least, particularly inapt. Passion without a clear link to the reality of the underlying situation is nothing more than an attempt at emotional manipulation. It is clear that the

¹⁷² Hasnas, *supra* note 1 at 1354-1355.

¹⁷³ For those who might not be familiar with this term, the “prisoner’s dilemma” is a situation where two persons who may have been involved in a single crime are each offered the opportunity to provide information to the police with respect to this crime. If neither speaks, it is likely that *neither of them* goes to jail. This is because, in most cases, the police may not have sufficient information with which to charge any individual with the underlying offence, without assistance from one of the participants. However, if one of the participants provides information, that participant will receive a discount on his or her sentence (often through allowing the cooperating participant to plead guilty to a lesser offence). The non-cooperating participant in the underlying offence would not be permitted to plead guilty to the lesser offence. In the end, therefore, if neither participant assist the police, both participants benefit through serving no jail time. But if anyone is going to speak, each participant wants to speak before the other, in order to be allowed to plead to a lesser offence.

offence used to encourage co-operation of the corporate employee cannot be comprised merely of a failure to speak.¹⁷⁴

I note, for the sake of completeness, that Professor Hasnas provides limited examples of offences which support the idea that the failure to speak itself can constitute criminal behaviour. While substantive federal criminal law could undoubtedly be improved, in my view, problems with offences does not justify turning away from the institution of organizational criminal liability

¹⁷⁴ Under Canadian law, it is the case that even presence at the wrongdoing of another does not, by itself, constitute a criminal offence. On this point, see *Dunlop and Sylvester*, *supra* note 94 at 898. Therefore, it seems unlikely, under Canadian law at least the mere knowledge of wrongdoing of another should, by itself, result in liability as a party to the offence. It is also interesting to note that under American federal criminal law, organizations are provided with specific incentives to separate the organization's behaviour from that of misbehaving employees. In other words, under the practice of the federal Department of Justice in Washington, the argument could be made that organizations are given an *ex post facto* opportunity to distance themselves from the behaviour that might otherwise result in criminal liability for the organization. See e.g. Laufer, *supra* note 63 at 62–64. Interestingly, this cannot fall within Professor Hasnas's argument. Technically, the organization is providing information to the authorities with respect to the wrongdoing of an individual (namely, its current or former employee). As such, this has no impact on the use of organizational criminal liability. The individual employee is not an organization. To clarify, seemingly unlike Professor Hasnas, I have little problem with employees assisting the authorities of their own free will. They may choose to assist the authorities because they believe in being good individual citizens. Alternatively, they may choose to assist the authorities to avoid any potential criminal charges that may arise from any alleged wrongdoing attributable to the individual employee. Some may suggest that an employee who is a potential criminal defendant may have little choice but to provide evidence against the organization of which he or she is an employee. However, there is a choice involved here. Does the employee hold sacrosanct any knowledge that he or she might have with respect to his or her employer, or does he or she strike a deal with prosecutors in order to divulge what he or she knows? As constrained a choice as this may be, it remains a meaningful choice. To that extent, the employee is acting of his or her own free will. For the purposes of this argument, I leave aside forms of legal coercion which would shock the conscience of any criminal court. For example, a corporate employee could not be dangled off the side of the building to convince the employee to provide evidence against his or her employer. Furthermore, as mentioned earlier (at note 145), prosecutors have particular ethical obligations to not charge persons with crimes that the prosecutor knows or believes cannot be proven in court. Again, if Professor Hasnas were to make the argument prosecutors may not always follow the ethical dictates of their position (an argument with respect to which I would take no position here), this would significantly adjust both Professor Hasnas's argument, and my response to it. However, since Professor Hasnas does not make this argument (at least explicitly), I need not respond with respect to the ethical obligations of prosecutors.

altogether.¹⁷⁵ To the extent that such offences exist in American federal criminal law, I suspect that Professor Hasnas would find much common ground in opposing those particular substantive provisions. The argument put forward by Professor Hasnas in this regard suggests that the entire purpose of organizational criminal liability is to circumvent the right of individuals to not provide evidence of wrongdoing of which they are aware. While such a right undoubtedly exists, the prevalence and study of "prisoner's dilemma" would seem to suggest that it is entirely appropriate for the authorities to use the knowledge of other citizens (whether charged with criminal offences alongside the organization or not) as a means to gather evidence by which those authorities will be able to convict a different offender (in our example, the organization). Professor Hasnas (to me, at least) simply has not provided convincing reasons why the same rules that apply to individuals ought not to apply when an organizational actor is involved in the alleged wrongdoing.

¹⁷⁵ For example, Professor Hasnas has problems with the breadth of the definition of "fraud" under the U.S. Code. Hasnas, *supra* note 1 at 1351. He uses Martha Stewart as an example of this overbreadth. But this is not even organizational criminal liability in its broadest sense. Martha Stewart is an individual. She is subject to the same laws as every other American citizen. Her participation in the business world does not change the rules of the game. What is even more problematic about Professor Hasnas's example is that earlier in his essay he suggests that there is little reason to pursue organizational prosecutions, because individual actors (rather than organizational defendants) have committed the underlying crimes. Therefore, to Professor Hasnas, this smacks of double punishment for the same crime. But when he is complaining about "white-collar crime" (as he does on page 1350), he seemingly believes that the individual is to be protected from overbroad legislation, and that since the legislation may be overbroad, we really should reconsider our notion of organizational criminal liability altogether. He also finds "conspiracy" to be overbroad as well. My only comment with respect to conspiracy is that the description offered by Professor Hasnas of federal conspiracy law seems remarkably similar to my home jurisdiction, though not identical. While there is often debate about these types of "inchoate" offences, there is also often recognition that these types of offences do serve a valuable purpose in our criminal law. If the legislation is overbroad, and criminalizes activities that in no way harm legitimate interests with which the state should be concerned, there may certainly be an argument that those laws need to be revised so as to narrow their scope. However, this is not the argument that Professor Hasnas is making in the rest of this paper. He conflates two issues: a) overbroad legislation should be narrowed (a position with which I can agree, at least in principle, though I am not prepared to take that position with respect to the laws which Professor Hasnas uses as exemplars for this purpose); and b) this argument justifies reconsideration of organizational criminal liability as a whole (a position to which I cannot subscribe).

7. *The regulatory state has sufficient remedies without organizational criminal liability*

Professor Hasnas seems to realize that allowing organizations to act with impunity would be considered by many to be an unacceptable state of affairs. His argument in this regard is that regulatory and other forms of law should be sufficient to fill this gap. He writes as follows:

In the absence of corporate criminal liability, there remains a wide array of legal protections for the societal interest in well-functioning markets. To begin with, there is the threat of criminal liability to the individuals who perpetrate the offenses. Individual corporate employees who commit crimes are always subject to prosecution if caught, and criminal conviction carries with it not only the disgorgement of their ill-gotten financial gains, but incarceration. This is surely a more potent deterrent to employees contemplating criminal activity than the threat that if they are caught, the corporation they work for will be subject to a fine. Furthermore, corporations are already subject to significant financial penalties for the criminal activities of their employees. When an offense involves the breach of a regulation, the corporation is subject to an administrative, civil penalty for the violation. But more significantly, when an employee's offense results in a loss to the corporation's shareholders or any other party, the corporation is subject to civil lawsuits and the resultant payment of damages. Because corporations are strictly liable for the torts of their employees committed within the scope of their employment, any corporation that fails to exercise proper oversight to prevent deceptive or fraudulent practices by its employees can be made to pay not only compensatory damages, but potentially massive punitive damages.

Furthermore, because civil plaintiffs are not subject to many of the restrictions on criminal prosecutors-plaintiffs' efforts at discovery cannot be thwarted by anyone's Fifth Amendment privilege, the defendant is not vested with a presumption of innocence that plaintiffs must overcome, and plaintiffs are not required to prove the elements of their case beyond reasonable doubt-it is usually easier for them to establish liability. The deterrent effect of such civil liability should not be underestimated.¹⁷⁶

To be honest, I suspect I could write an entire paper on the assumptions underlying these two paragraphs. Professor Hasnas seems to assume that shareholders pay the price for any financial penalty visited upon the organization. As I have discussed above, I simply cannot accept that assertion,

¹⁷⁶ *Ibid* at 1345-1346.

at least insofar as it concerns corporations that have separate legal personality from their shareholders. I need not repeat that argument here.¹⁷⁷

Second, Professor Hasnas assumes that financial penalties are the only penalties to which an organizational criminal offender may be subject, at least in terms of the criminal law. Rather, conditions in a probation order could give the apparatus of the state more power to monitor organizational offenders who have been convicted, in order to ensure that appropriate steps are taken to make a repetition of the offence less likely in the future. Even if that were not available, the very fact that the victims of the offence could call the act “criminal”, not in a colloquial or everyday sense, but rather, having the imprimatur of censure that is officially visited upon an offender and available to the public, may have both symbolic meaning to the victims and a commercial effect on the public.

While this was not drawn from the world of organizational criminal liability, the trial of O.J. Simpson for the murder of his wife and her friend was front page news for months. I know this for certain because I was in law school during the trial. Essentially, the trial played out in the student lounge. Even people who claim not to be interested in criminal law would go to the student lounge to watch. His criminal acquittal shocked many and disillusioned quite a few about the propensity of the criminal law to achieve justice. It sparked debate about whether cameras really should be in the courtroom.

The later finding of civil liability against Mr. Simpson was frankly, for many of us at least, a footnote to history. While I am sure the court finding at the civil trial was of some comfort to those left behind after the death of the victims, it would still not label the defendant as a “murderer.”

Third, the fact that the Fifth Amendment would not apply in civil proceedings is undoubtedly true. But, in my view, this hardly justifies allowing organizations that misbehave to simply pay money to essentially “buy permission” and go on their merry way. Civil justice is easier, and as Professor Hasnas himself point out, for good reason. Criminal law is our statement of

¹⁷⁷ In a different publication, I have suggested that it may be possible to attribute separate legal personality to certain types of organizations for the purposes of the criminal law only. Chief among these types of organizations is that of the partnership. In general, in Canada, partnerships are not thought to have separate legal personality in the same way that corporations do. Therefore, in this other publication, I put forward an argument as to how organizational criminal liability could apply to such organizations. See Darcy L MacPherson, “Criminal Liability of Partnerships: Constitutional and Practical Impediments” (2010) 33 *Man LJ* 329. Given that Professor Hasnas restricts himself largely to *corporate* criminal liability, I will not tackle the unique issues that other forms of organizations (such as partnerships) may present. The resolution of these issues, though important, will have to wait until another day.

moral fibre. Everyone who wants to participate in our jurisdiction – one might even say “democracy writ large” – implicitly consents to play by those moral rules, even if they disagree with them. It is not that our criminal law remains fixed and unchangeable. Rather, there is an obligation on everyone who wishes to take the benefits of our system (whether American or Canadian) to learn these basic rules, and either (a) abide by them; (b) be prepared to accept the censure that comes from breaking them.

Fourth, Professor Hasnas seems to assume that every victim has the funds, knowledge and other wherewithal necessary to pursue their claim to the full extent of the law. This assumption is provably false. As I pursued my PhD, we had a lecture from a research ethics specialist at the university, whose job it was to vet research proposals involving human subjects. While this was at a Canadian university, she relayed stories that any ethical researcher would find problematic, to say the least, from both sides of the Canada-U.S. border. Generally, they involved researchers who convinced potential research participants who were either poor, racialized, imprisoned, or less educated than those conducting the research, and usually more than one of these, to participate in a study. The research engaged in was often dangerous, and not to the benefit of the research participants. Put another way, the researchers specifically targeted groups who would be less likely to complain about the negative impacts of the research on their well-being.

Private litigation is not inherently dangerous, but if organizations were to victimize groups of people who, because of their socio-economic status, lower educational level, or their racialized status, are less likely to be likely to seek private redress, this would be particularly problematic. But corporations would be incentivized to do exactly this if the model of private ordering proposed by Professor Hasnas were seen as sufficient to replace organizational criminal liability.

The private “remedies” referred to by Professor Hasnas may simply be unattainable for reasons having nothing to do with the merit of the wrong done to members of these marginalized and other groups. One of the elements of the criminal law (as opposed to its civil counterpart) is that the public itself is interested in seeing justice done. The victim need not prosecute the wrong done to him or her. Society itself sees value in ensuring that justice is done.

The socio-economic status or other characteristics that may marginalize the victim's ability to seek justice is not determinative.¹⁷⁸

Fifth, there are serious problems with a conception of the state as being to provide a regulatory equivalent to the criminal law. The regulatory state is not all-encompassing. Some industries are entirely, or at least mostly, outside of industry-specific, detailed regulation by the state. While the state could create a generalized, regulatory apparatus that would be in its scope largely equivalent to the effect of the criminal law, why replicate anything when such a generalized apparatus already exists, that is, the criminal law itself?

But, the second reason is still more fundamental. If, as Professor Hasnas himself claims,¹⁷⁹ the criminal law has a base of moral responsibility (and this is one of a limited number of points in which I suspect Professor Hasnas and I would find common ground with respect to organizational criminal liability),

¹⁷⁸ Of course, the criminal law is not immune to prejudices against minority victims. Nothing I write here should suggest otherwise. I also acknowledge that participants in the criminal justice system are far from perfect in avoiding these biases. As but one example of this, one sees such bias in the use of "rape myths" to discredit victims of sexual assault (predominantly women, often of lower socio-economic status compared to the men against whom they make allegations of sexual assault). Rather, my point is very specific. The criminal law can alleviate some of the systematic and structural impediments that exist in civil justice for those of lower socio-economic status seeking justice, when the state takes the burden of both investigating and prosecuting the wrong done.

¹⁷⁹ Hasnas, *supra* note 1 at 1331.

the regulatory state cannot be an effective substitute for the unequivocal “moral high ground” that the criminal law is designed to occupy.¹⁸⁰

Therefore, for Professor Hasnas to suggest that civil and regulatory burdens can take the place of the criminal law simply shows a level of privilege that may accompany his views on the efficacy of civil justice. Clearly, not everyone enjoys the same access to these “remedies.” For those who enjoy little, if any, access to civil justice, the criminal sphere may provide the only very limited means of redress available.

VI. CONCLUSION

In the end, I cannot agree with Professor John Hasnas that the institution of organizational criminal liability needs to be abandoned. His basic assumption is that anyone (such as myself) who wants to use organizational criminal liability has to prove why such liability should be allowed. I start with the basic assumption that any citizen of a country must be subject to the basic moral compact of the jurisdiction. This basic moral compact is best legally represented by the criminal law. Once one accepts the need for organizational

¹⁸⁰ Where legislation prohibiting an activity has been struck down as not passing constitutional muster, this does not necessarily remove the state’s ability to regulate that same activity. For example, in *Health Services and Support – Facilities Subsector Bargaining Assn v British Columbia*, 2007 SCC 27, [2007] 2 SCR 391, *per* Chief Justice McLachlin and Justice LeBel, for the majority, held that legislation curtailing the collective bargaining rights of workers was constitutionally infirm. However, general labour legislation about how collective bargaining was to be carried out was and remains a critical element of labour relations in Canada. While this example is not drawn from the criminal-law realm, it nonetheless shows the criminal law is separate from, and serves a different purpose than, the more general regulatory state. Prohibition on moral grounds is quite different from ensuring safe use of materials. The difference is perhaps best described by the criminal prohibition against driving while under the influence of alcohol or other intoxicants, on the one hand, and the state’s interest in ensuring the proper licensing of motor vehicle drivers. The first of these clearly belongs in the criminal law. Even if the prohibition against driving under the influence were removed, the state’s interest in regulating driving would remain in place. While one’s license can be suspended for reasons involving the criminal law (including, ironically enough, driving while under the influence), it is quite clear that a license can also be suspended for other, more mundane, reasons (including provincial offences such as speeding, or other moving violations), that are not “true” criminal offences, and are thereby generally considered to be unconnected to the criminal law. In both cases, the license is suspended. In that sense, the regulatory state and the criminal law may end up in the same place. However, in my view, there is something quite different about having one’s license suspended for nonpayment of the traffic-related fine, on the one hand, and having one’s license suspended for driving while under the influence of intoxicants, on the other. Therefore, to suggest, as Professor Hasnas does, that the regulatory state can somehow provide an equivalency to the criminal law involves, for me at least, simply an unacceptably large leap of faith.

criminal liability (because a corporation is a “person,” and thus, a citizen), the need to discuss the mechanism by which we accomplish this is on the table, and an abolitionist stance (such as that put forward by Professor Hasnas) becomes more difficult to justify.

The idea that a corporation is not capable of morality does not change my conclusion that organizational criminal liability is a necessary part of criminal law. Legal insanity is very narrow, and the law has determined that corporations can have a “brain.” Also, businesspeople seek the advantages of incorporation and the separate legal personality that with it. In my view, those same businesspeople cannot claim that the less pleasant parts of personhood, like organizational criminal liability, can be avoided because the personhood does not extend that far.

Professor Hasnas says that the purpose of organizational criminal liability is to punish the innocent. In my view, this is simply not true, neither in the case of the corporation nor that of the shareholders. While any actual or potential abuse by prosecutors should be taken seriously and dealt with as a breach of legal ethics but is not a reason to jettison organizational criminal liability altogether. Also, contrary to the assertion of Professor Hasnas, in my view, the organization does commit a public wrong in cases of organizational criminal liability. The involvement of the organization is often an integral part of the wrongdoing, in the sense that in many cases, the wrongdoing is not possible without the involvement of the organization, often on account of the organization’s size and reputation.

Public policy does not, in my view, support the idea that organizational criminal liability should not be used. Criminal law is designed to protect the rights of the accused and other citizens against the awesome power of the state. However, the same law also supports the right of law enforcement to carry out their role through legitimate means. Professor Hasnas makes no reference to this other goal, or to the balance between the two somewhat contradictory elements of the criminal law. Unlike Professor Hasnas, I am unconcerned that organizational employees may be turned against their employer. This would be entirely appropriate between two individuals (as a case of “prisoners’ dilemma”). The interposition of an organization should, in my view, change nothing. I agree with Professor Hasnas that regulatory statutes are an important element of the modern state, but it cannot provide a meaningful substitute for the criminal law.

My goal was to use my outsider status to bring a different perspective to an issue that affects both countries on the Canada–U.S. border. By examining our differences, perhaps some sort of common solutions might appear. For now, I hope that this might reinvigorate the debate about organizational criminal

liability generally. Where that debate goes from here will depend on insiders and outsiders continuing to consider how best to move forward.